No. [redacted]49

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

v.

HERMAN JANOWITZ ET AL.

ON ERROR FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF ON BEHALF OF THE UNITED STATES.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1921

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HERMAN JANOWITZ ET AL. } No. 331.

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BRIEF ON BEHALF OF THE UNITED STATES.

STATEMENT OF CASE.

The defendants in error, hereinafter called the defendants, were indicted in the Southern District of New York on two counts (R. 29). The first count charged a conspiracy to defraud the United States by impairing, obstructing, and defeating the lawful functions of the Treasury Department, under section 6 of the Act of September 24, 1917, c. 56, 40 Stat. 291, Comp. Stats., section 6829–1, section 2 of the Act of September 24, 1918, c. 176, 40 Stat. 966, and the regulations issued by the Secretary of the Treasury pursuant thereto, in the issuance, sale, and redemption of war savings certificates. The count

referred to the said two statutes which, in so far as material to this case, are as follows:

> * * * the Secretary of the Treasury is authorized to borrow from time to time, on the credit of the United States, * * * such sum or sums as in his judgment may be necessary, and to issue therefor, at such price or prices and upon such terms and conditions as he may determine, war-savings certificates of the United States on which interest to maturity may be discounted in advance at such rate or rates and computed in such manner as he may prescribe. Such war-savings certificates shall be in such form or forms and subject to such terms and conditions, and may have such provisions for payment thereof before maturity, as the Secretary of the Treasury may prescribe. Each war-saving certificate so issued shall be payable at such time, not exceeding five years from the date of its issue, and may be redeemable before maturity, upon such terms and conditions as the Secretary of the Treasury may prescribe.
>
> * * * it shall not be lawful for any person at any one time to hold war-savings certificates to an aggregate amount exceeding $1,000. The Secretary of the Treasury may, under such regulations and upon such terms and conditions as he may prescribe, issue, or cause to be issued, stamps to evidence payments for or on account of such certificates.

It then referred to certain regulations or terms and conditions contained in two circulars issued by the Treasury Department on November 15, 1917 (Depart-

ment Circular No. 94—War Savings Circular No. 1), and December 18, 1918 (Department Circular No. 128), respectively, by which circulars it was stipulated that no war-savings certificates would be issued by the United States unless at the same time one or more war-savings certificate *stamps* should be purchased and affixed thereto, and that the name of the owner of each war-savings certificate must be written upon such certificate at the time of the issuance thereof, that the said war-savings certificates were not transferable and were payable by the United States only to the respective owners named thereon, except in cases of death or disability of the owner thereof. Said circulars further stipulated that the owner of a war-savings certificate should be entitled to redeem same before maturity at a fixed price at any money-order post office upon ten days' notice and surrender of the certificate with the receipt printed thereon duly signed.

Copies of the war-savings certificates of 1918 and 1919 were attached to the indictment in *United States* v. *Paul Sacks*, No. 330 on the docket of October term, 1920, of this court, and, since there is no possible dispute as to the form of these certificates, they may be read into the indictment in the present case just as though their terms had been specifically alleged. These certificates certified on their face that, *subject to the terms and conditions printed on them, the owner* would be entitled to receive certain payments from the United States. The terms and conditions to which the obligation was thus ex-

pressly on its face made subject were that the certificate was not a valid obligation of the United States unless a war-savings certificate *stamp* was attached to it, that the certificate was of no value except to the owner, and was not transferable, that no person should at any time hold certificates to an aggregate amount exceeding $1,000, and that upon payment the certificate must be surrendered and a receipt signed certifying that the payee was the identical person whose name was signed on the certificate as the original owner thereof and was receiving payment on his own account.

The count then alleged that the defendants conspired to defraud the United States, in respect of the said terms and conditions of war-savings certificates, by purchasing such certificates with stamps attached from persons not authorized by the Secretary of the Treasury to sell them, tearing or removing the stamps therefrom, affixing said stamps to blank war-savings certificates illegally obtained, writing on these latter certificates the name of some person other than the defendants as owner, and obtaining in this manner the payment before maturity of said certificates at a United States post office.

The count then alleged that, to effect the object of the conspiracy, the defendant Herman Janowitz maintained an office in New York City for the purchase of war-savings certificates and war-savings certificate stamps.

The second count charged practically the same facts set out above as charged in the first count, but under the aspect of a conspiracy to commit an offense against the United States, viz, a violation of section 148 of the Criminal Code which punishes any person who, with intent to defraud, alters any obligation of the United States. The count charged that under the law and regulations set out above, as under the terms and conditions of the war-savings certificate itself, the obligation of the United States, referred to in section 148, Criminal Code, was the certificate, *with the stamp attached*, and that the alteration of it consisted in removing from the certificate an essential element, viz, the stamp. This was to be done with intent to defraud, because it was to be done with intent, by deceit and misrepresentation, to impede, obstruct, and interfere with the lawful functions of the Treasury Department in the sale and redemption of war-savings certificates.

Both counts of the indictment were demurred to (R. 10), and the demurrer was sustained (R. 17, 18):

> * * * because the facts alleged in either count of the indictment are not sufficient to constitute a crime under any construction of the act of Congress upon which it is alleged to be predicated, to wit, the act of Congress of September 24, 1917, section 6, and the act of Congress of September 24, 1918, section 2 thereof, and sections 37 and 148 of the Criminal Code of the United States, or under the construction of any other statute of the United States now in force. * * *

Thereupon this writ of error was allowed under the provisions of the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246.

ASSIGNMENTS OF ERROR.

The assignments of error numbered 21 (R. 19–23). They may be summed up as complaining of the ruling of the district judge (R. 12–17, *United States* v. *Janowitz*, —— Fed. ——) to the effect that the Secretary of the Treasury had no power, under section 6 of the Act of September 24, 1917, c. 56, to make regulations or conditions such as are alleged in the indictment, viz, that the certificate should not constitute an obligation of the United States unless a stamp was affixed to it, that it should not be transferable, that the original owner's name should be written upon it, and that it should be payable only to such original owner and on his receipt; and that, therefore, the United States could not be defrauded by what defendants conspired to do, nor was any obligation of the United States altered, within the meaning of section 148, Criminal Code, by separating the stamp from the certificate.

QUESTIONS INVOLVED.

The questions involved are:

(1) Did the rules of the Treasury Department prohibit the things alleged by the indictment to have been contemplated by the conspiracy of defendants?

(2) If the Treasury rules are to be interpreted as going this far, is their violation criminal?

(3) If the rules do go as far as above indicated and the intent thereof was to make their violation criminal, are such rules so interpreted within the statutory power of the Secretary of the Treasury?

This is practically the statement of the questions involved made by the district judge (R. 14).

Only the third of these questions was answered by the district judge unfavorably to the plaintiff in error, so that possibly said third question is the only one involved on a proceeding in error under the Act of March 2, 1907, c. 2564. (See *United States* v. *Keitel*, 211 U. S. 370, 398, 399; *United States* v. *Miller*, 223 U. S. 599, 602.) Nevertheless, in order that this court may be fully advised on the whole case, we discuss all three of the above questions.

ARGUMENT.

I.

The rules or terms and conditions stipulated by the Secretary of the Treasury in Department Circulars of November 15, 1917 (No. 94), and of December 18, 1918 (No. 128), respectively, directly prohibited the things contemplated by the conspiracy of defendants.

To demonstrate this requires nothing more than a reading of the circular of November 15, 1917. It expressly stated that a war-savings certificate would be an obligation of the United States when and only when a stamp should be affixed thereto, and that no certificate would be issued unless, at the time,

at least one stamp was purchased and affixed thereto; that the name of the owner must be written on the certificate at the time of issue; that such owner of a certificate should be entitled to receive at maturity of the certificate, January 1, 1923, upon surrender thereof and upon compliance with all its provisions, five dollars in respect of each stamp then affixed thereto, at the Treasury, or at any money-order post office after ten days' notice; that any such owner should be entitled to receive before maturity, upon surrender of the certificate and upon compliance with its provisions, a discounted sum with respect to each stamp then affixed thereto, at any money-order post office on 10 days' notice; and that war-savings certificates were not transferable and would be payable only to the respective owners named thereon, except in the case of the death or disability of such owner. In addition, not only did the war-savings certificates themselves contain the substance of these conditions printed on their face, but the act of September 24, 1917, c. 56 itself, in its distinction between certificates and stamps, clearly pointed to the real end of the regulations or conditions.

Section 6 of that act authorized the Secretary of the Treasury to borrow, on the credit of the United States, and to issue for the sums so borrowed war-savings certificates of the United States, on which interest to maturity was to be discounted, which were to be in such form as the Secretary might prescribe, were to be payable at a time not exceeding five years from date of issue, but might be redeem-

able before maturity, of which no one person could hold more than $1,000 worth in the aggregate. Section 6 then went on to provide that the Secretary might issue stamps "to evidence payments for or on account of such certificates." The act, therefore, clearly made the certificate the obligation of the United States and the stamp merely a method of fixing the amount of said obligation. The Secretary might, if he had chosen, have caused the amount of the obligation to be printed on the certificate once for all. He might have caused it to be written on the certificate each time a payment was made. Instead he provided, as the act authorized, that stamps should be employed to be pasted on the certificates, the aggregate amount of stamps representing the aggregate amount of the obligation. By the very terms of the act, therefore, the stamp was of no value as representing an obligation of the United States until and only so long as it was affixed to the certificate, when it merely factored in fixing the obligation of the certificate, and both the certificate and the stamp so stated on their face. It appears, therefore, that the only material provision of the regulations or conditions which did not appear in express terms in the act was the provision that the certificates were nontransferable and would be paid only to the respective owners named thereon.

It would be a waste of time to argue that it would be directly contrary to the spirit and letter of the act and of the regulations or conditions promulgated by the Secretary of the Treasury to effect the con-

spiracy described in the indictment in the case at bar, viz, to purchase war savings certificates (which are nontransferable), to remove the stamps from them (when the only function of the stamp is, as a part of the certificate, to aid in fixing the amount of its obligation), to surreptitiously obtain blank certificates (when such certificates could only be properly in the hands of the public after at least one stamp had been affixed to them), to write names on such certificates of persons who were not the purchasers thereof, to affix the detached stamps to such certificates with which they had no legal, as distinguished from physical, connection, to cause the redemption of such certificates by persons not the real owners thereof, and thus evade the express provision of the act that no person should hold in the aggregate more than $1,000 worth of certificates.

II.

A conspiracy to violate, in the manner alleged in the two counts of the indictment, the regulations or conditions prescribed by the Secretary of the Treasury, constituted

(a) A conspiracy to defraud the United States within the meaning of section 37, Criminal Code, and

(b) A conspiracy to alter an obligation of the United States, with intent to defraud, within the meaning of section 148, Criminal Code.

(*a*) That portion of section 37, Criminal Code, which relates to a conspiracy to defraud the United States, has been authoritatively construed by this

Court. In *Haas* v. *Henkel*, 216 U. S. 462, 480, it was said:

> The statute is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of Government.

This view was affirmed in *United States* v. *Plyler*, 222 U. S. 15, 17, and the very language was repeated in *United States* v. *Barnow*, 239 U. S. 74, 79. (See also *Stager* v. *United States*, 233 Fed. 510; *United States* v. *Galleanni*, 245 Fed. 977; and *Hamburg-American Steam Packet Company* v. *United States*, 250 Fed. 747.) Attention should particularly be called to *United States* v. *Keitel*, 211 U. S. 370, for its highly significant bearing upon the case at bar. In *Keitel's case* the first count charged a conspiracy to defraud the United States by getting persons to enter coal lands in their own names, ostensibly for their own benefit but in reality for the benefit of the defendants, to whom the title was ultimately to be conveyed, in order to evade the provisions of the statutes of the United States forbidding the acquisition by one person of more than 160 acres of coal land. It was claimed, on behalf of defendants, that the statute authorized any one person to purchase 160 acres; that when he had purchased this amount he necessarily had the absolute right of alienation to whomsoever he pleased; that the United States received its money just as much whether the entrymen entered for themselves or for another; and that consequently a conspiracy to acquire more than 160 acres by means of

persons not really acquiring title for their own use could not be a conspiracy to defraud the United States. In disposing of this claim the court said (211 U. S. 393, 394):

> The contention that the word "defraud" must be confined to its common-law significance, and hence can not embrace the acts here charged, is without merit, even if we concede for the sake of argument that the word has a common-law meaning, and that that meaning would be implied if the word stood alone in the statute. This follows because the argument rests upon the assumption that the word "defraud" stands alone in the statute, and ignores the broader meaning which must result from the words "in any manner or for any purpose," by which the word "defraud" is accompanied in the statute. Besides, the contention is foreclosed by *United States* v. *Trinidad Coal Company*, where transactions of the very nature of those here charged were declared to be a fraudulent obtaining of the lands of the United States, and, indeed, transactions generally of a like character formed the subject matter of the ruling in *Hyde* v. *Shine*.
>
> The unsoundness of the argument that as when the prohibited entries were made the price of the lands was paid to the United States, therefore the United States could not have been defrauded, is refuted by its mere statement. If it were true, then in every case, however flagrant, where the lands of the United States were procured in violation of

express prohibitions of law, the element of fraud would cease to exist by the mere payment of the price; that is to say, the successful operation of the fraud would deprive the transaction of its fraudulent character. But the inherent weakness of the contention need not be further pointed out, because its want of merit is conclusively established by the ruling in *Hyde* v. *Shine*, where a like contention was decided to be without foundation.

The cases referred to above, and particularly *United States* v. *Keitel*, are conclusive of the case at bar on the point now under consideration. A conspiracy to violate the provisions of the statute relating to the distinctive functions of the certificates and stamps, and the provisions of the Treasury circulars relative to the form of the certificates, their nontransferability and the method of their redemption was a conspiracy to obstruct and defeat the functions of the Treasury Department relating to the issuance and redemption of war-savings certificates, as fixed by the statute and by the regulations, and was, therefore, a conspiracy to defraud the United States.

(*b*) The second count of the indictment charged a conspiracy to alter an obligation of the United States with intent to defraud. The last element of the offense is covered by what has been said above, for the reason that, if the facts alleged in the indictment constituted a conspiracy to defraud the United States, an intent to defraud is necessarily shown by these same allegations when connected with the

specific act of altering an obligation of the United States. The only question, therefore, is whether the removal of a stamp or stamps from a war-savings certificate validly issued would be an alteration of an obligation of the United States. Of this there can be no possible doubt. Both by the statute and by the Treasury regulations or conditions the war-savings certificate with one or more stamps on it constituted the obligation of the United States. Neither the certificate alone, nor the stamp alone, constituted such obligation. It was their conjunction which made the obligation, and consequently their disjunction altered it or changed its character.

III.

The Secretary of the Treasury had power to make and promulgate the regulations or conditions contained in the circular of November 15, 1917 (No. 94).

(*a*) The district judge held that the Secretary did not have this power, and for this reason alone sustained the demurrer. His reasoning was that to take away from war-savings *stamps* the right of transferability was to deprive them of their value contrary to the intent of Congress and the course of business actually pursued; that when Congress authorized the issuance of stamps "to evidence payments for or on account of such certificates," and did not expressly deny to the stamp holders the right of alienation, such right necessarily existed as inherent in the right to property having value, and that, therefore, a regulation by the Secretary of the

Treasury taking away this right of alienation was contrary to the act of Congress and, therefore, void. Is this reasoning sound?

(*b*) The manner and frame of mind in which this question should be approached is thus stated by Mr. Justice Harlan, delivering the opinion of this court in *Boske* v. *Comingore*, 177 U. S. 459, 470:

> At any rate, the Secretary deemed the regulation in question a wise and proper one, and we can not perceive that his action was beyond the authority conferred upon him by Congress. In determining whether the regulations promulgated by him are consistent with law, we must apply the rule of decision which controls when an act of Congress is assailed as not being within the powers conferred upon it by the Constitution; that is to say, a regulation adopted under section 161 of the Revised Statutes should not be disregarded or annulled unless, in the judgment of the court, it is plainly and palpably inconsistent with law. Those who insist that such a regulation is invalid must make its invalidity so manifest that the court has no choice except to hold that the Secretary has exceeded his authority and employed means that are not at all appropriate to the end specified in the act of Congress.

It is most important that this great rule of administrative law should be constantly observed, and especially so when there is involved a matter of such magnitude and complexity as the borrowing, in time of war, of $2,000,000,000 by the sale of war-savings

certificates—a wholly novel method of financing Government needs. Large scope and room should be left the Secretary of the Treasury to devise and select the means which he may deem appropriate for such purely fiscal ends.

(*c*) It is impossible to conceive of any form of language open to Congress which would have conferred larger powers upon the Secretary of the Treasury than those conferred by section 6 of the Act of September 24, 1917, c. 56. These powers are not conferred in the shape of power to make regulations, but are inserted into the very frame of the scheme itself. The Secretary is authorized to borrow such sums as in his judgment shall be necessary, and to issue therefor war-savings certificates "at such prices and *upon such terms and conditions as he may prescribe.*" These certificates are to be "*in such form or forms and subject to such terms and conditions, and may have such provisions for payment thereof before maturity*" *as he may prescribe.* The certificates are to be payable and redeemable before maturity "*upon such terms and conditions as the Secretary of the Treasury may prescribe.*" As to the stamps, upon whose character the District Judge lays the most stress, they may be issued "under such regulations *and upon such terms and conditions as he may prescribe,*" and, in any event, their function is merely to evidence payments on the certificates.

The key to the intent of Congress in the above legislation is found in the provision that it shall not be lawful for any person at any one time to hold war-

savings certificates to an aggregate amount exceeding $1,000. That is, the appeal for the loan was to be made to small investors who either did not save at all, or who used savings banks. A security was to be devised which would attract such persons and such persons only, would induce them to hold their investments as long as possible and increase them at every opportunity, and would prevent loss to them either by theft or by persons preying on their necessities. The scheme devised by the defendants is an illustration of the necessity of protection against both of these attacks, for it could only be successful through the purchase, at a large discount, of certificates which had been stolen or otherwise illegitimately acquired, or were held by owners in such straits as not to be able to wait the ten days necessary for redemption for full value at a money-order post office.

Keeping in mind this ultimate intent of Congress to reach and encourage small investors, can it possibly be said that the conditions promulgated by the Secretary of the Treasury in Circular No. 94, to the effect that the certificates and stamps were non-transferable, that the certificate must bear the owner's name and be redeemed only by him, that the stamps evidencing the amount of the obligation should be his property and affixed to the certificate for his benefit—in short, that the certificates and stamps should not be the subject of speculation and traffic but should represent a genuine loan of money by persons of small means to the Government—were so utterly unreasonable and outside of the scheme of

the act as to be null and void? To ask this question is (in our judgment) to answer it.

(*d*) The reasoning of the district judge seems clearly to be a *petitio principii*. He first inserts into the concept of a war-savings stamp the quality of "value" which, he assumes, necessarily implies free transferability; having thus unconsciously created this quality of "value," he draws it out again to show that Congress, in authorizing war-savings stamps, must have intended that they should have this transferable "value." In other words, he infers his conclusion from a premise which itself contains, without proof, this very conclusion. The proper method of reasoning is simply to endeavor to discover, without preconceived ideas on the subject, what Congress, by section 6 of the Act of September 24, 1917, c. 56, intended war-savings certificates and stamps to be. These instruments represented the contract which Congress authorized by section 6, and their "value" was simply the value of that contract, no more, no less. If Congress, in order to reach real investors of small means or of small inclination to save, intended to authorize the Secretary of the Treasury to make contracts by which the certificate with one or more stamps affixed represented the obligation which was to go to the hands of a small bona fide investor, and to remain there, not being transferable, until redeemed by the owner himself on 10 days' notice and surrender of the certificate with his signed receipt, then the "value"

of the certificate or stamps is precisely measured by the value of such a contract, and it is immaterial that, if the certificates and stamps were freely transferable, they would have a greater "value," and that, therefore, Congress should have made them freely transferable. The argument, therefore, comes back again to the question, Did Congress by section 6 of the Act of September 24, 1917, authorize the Secretary to enter into contracts of this character? and again we answer that undoubtedly it did. It indicated its main ideas by providing for certificates, for stamps to evidence payments on them, and by prohibiting individual ownership exceeding $1,000; and it then granted to the Secretary every power it could think of to carry out this main idea. The Secretary, being charged with the responsibility for the successful issue of this great experiment, honestly thought that the conditions he promulgated were germane to the end sought by Congress, and it is difficult, if not impossible, to see how the courts can assume authority to say that he was manifestly and totally wrong.

(*e*) The idea which is, whether consciously or unconsciously, at the bottom of the district judge's reasoning, viz, that a right *ex contractu* against the United States must necessarily be freely assignable, is shown to be unsound by the provisions of the act of February 26, 1853, c. 81, 10 Stat. 170, and of section 3477, R.S., forbidding the assignment of claims against the United States except with certain formalities

after warrant has issued; and by the decisions of this Court applying these statutes so as to make null and void *inter partes* assignments of or liens upon the claim or its proceeds made or created in favor of bona fide purchasers for value. (See *United States* v. *Gillis*, 95 U. S. 407, 413, 414; *Spafford* v. *Kirk*, 97 U. S. 484, 488, 489; *Ball* v. *Halsell*, 161 U. S. 72, 84; *Nutt* v. *Knut*, 200 U. S. 12, 20, 21; *National Bank of Commerce* v. *Downe*, 218 U. S. 345, 356, 357; *Capitol Trust Company* v. *Calhoun*, 250 U. S. 208, 218–220; *Calhoun* v. *Massie*, 253 U. S. 170, 173–175.) In the case of *Capitol Trust Company* v. *Calhoun*, *supra*, a claim was made in all essential respects the same as that made in the case at bar viz, that there was a preexisting valid right to counsel fees to take away which would be to deprive a property right of its value. This Court answered it by the statement that the "value" of the right, since it was created by act of Congress, was merely what the creating legislation gave it. In both the *Capitol Trust Company case* and in *Calhoun* v. *Massie* reference was made, as bearing on the question, to the cases enforcing legislation in which Congress has controlled the disposition of pension moneys, namely, *United States* v. *Hall*, 95 U. S. 343; *Frisbie* v. *United States*, 157 U. S. 160; *United States* v. *Van Leunen*, 62 Fed. 52.

We again refer at this point to *United States* v. *Keitel*, 211 U. S. 370. In the statutes relating to coal lands before the court in that case there was no

provision that an entry should not be alienable, and yet a conspiracy to obtain more than 160 acres by procuring entries by agents who should afterwards assign the entries to the defendants was held to be a conspiracy to defraud the United States; that is, a restriction on alienation was implied under certain circumstances. It is difficult to distinguish the *Keitel case* in its broad aspects from the case at bar.

(*f*) Reference should also be made to cases such as *United States* v. *Grimaud*, 220 U. S. 506, 515, 516 (where power to make regulations restricting the right to use public lands was sustained); *United States* v. *Small*, 236 U. S. 405, 412; and *United States* v. *Morehead*, 243 U. S. 607, 613, 614 (where regulations were sustained and read into the definition of perjury, against objection that they were inconsistent with the legislation of Congress). These cases, and others which might be cited, illustrate the application of the rule quoted above from *Boske* v. *Comingore*, that regulations issued pursuant to an act of Congress will be sustained unless it can be clearly shown that they are wholly in excess of the power granted or necessarily contrary to some express provision of law.

(*g*) Prior to the decision of Judge Hough, whose review is sought in the present proceeding, Judge Augustus Hand had decided directly to the contrary on demurrer to the indictments in the case at bar. His opinion is printed as an appendix to this brief.

CONCLUSION.

The judgment of the district court should be reversed and the case remanded with instructions to overrule the demurrers.

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Assistant Attorney General.
WILLIAM C. HERRON,
Attorney.

APPENDIX.

NITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK.

IE UNITED STATES OF AMERICA, plaintiff, *v.* ERMAN JANOWITZ, HERMAN OESTREICHER, Henry Goldstein, Etta Levine, Julius Roth, and John C. Dalton, DEFENDANTS.	C 2—243.

murrer to indictment on the ground that it does not state facts sufficient to constitute an offense against the United States. Demurrer overruled.

The indictment contains two counts, each for conracy, under No. 37 of the Criminal Code. The first unt is for a conspiracy to defraud the United States d the second to violate No. 148 of the Criminal Code altering an obligation of the United States for the rpose of defrauding the Government.

The indictment alleges that the defendants conred to procure blank war-savings certificates and tach to them war-savings stamps which had been tached from war-savings certificates which the dedants should purchase from persons who could not vfully sell the same; to write upon the blank cercates the name of some person other than the

defendants; to present such blank certificates, to which the detached stamps had been thus affixed, at a post office of the United States, and endeavor to secure payment thereof.

The act of Congress under which war-savings certificates are issued provides that the Secretary of the Treasury may issue war-savings certificates

> in such form or forms and subject to such terms and conditions, and may have such provisions for payment thereof before maturity, as the Secretary of the Treasury may prescribe. * * * It shall not be lawful for any one person at any one time to hold war-savings certificates of any one series to an aggregate amount exceeding $1,000.

The Secretary of the Treasury promulgated the following regulation:

> That no certificate would be issued unless at the same time one or more stamps should be purchased and affixed thereto;
>
> That the name of the owner of each certificate must be written upon such certificate at the time of the issuance thereof;
>
> That said certificates were not transferable, and were payable by the United States only to the respective owners named thereon, except in case of death or disability of the owner thereof;
>
> That an owner of a certificate at his option would be entitled, prior to maturity of said certificate, to receive at a money-order post office of the United States upon surrender of his certificate to said post office in respect to each stamp then affixed to such certificate an amount fixed by the Secretary of the Treasury to be the price at which said stamps should be redeemed and during the month and the year the said certificates should be

surrendered by the said owner, and that no post office should make any such payment until 10 days after receiving written demand therefor;

And the Secretary of the Treasury of the United States further provided that upon surrender of a certificate for payment that the receipt for payment thereof, printed thereon, should be signed in the presence of the official of the United States to whom said certificate should be surrendered for payment.

Goldstein & Goldstein, attorneys for defendants-demurrants; David Goldstein, counsel.

Francis G. Caffey, United States attorney, opposed; James Osborn, Assistant United States attorney, counsel.

AUGUSTUS N. HAND, District Judge:

It is contended by the demurrants that disobedience to the regulations of the Secretary of the Treasury does not constitute a crime against the United States. This is in a literal sense true. The indictment is, however, based upon no such theory. The act in terms enables the Secretary to fix the terms of the war-savings certificates, and provides that no one person shall hold more than $1,000 thereof. It is quite in accord with those provisions that the Secretary has made regulations that no certificate shall be issued unless one or more stamps are affixed thereto, that the name of the owner shall be written on the certificate, and that the certificate shall not be transferrable. In no other way could the provision that no person shall hold more than $1,000 of certificates be enforced, and in no other way could it be made certain that the purchaser shall obtain from the Government the predetermined value

of his certificate. Both of these things are essential to the system, which the Treasury Department inaugurated in issuing war-savings certificates and both are within the powers given the Secretary to regulate the terms under which the certificates should be issued.

As Congress gave the Secretary complete control over these terms, it is unnecessary for me to defend the wisdom of them, but I believe the reason for the peculiar provisions of the department is obvious. The Government expected that these war-savings stamps would be purchased chiefly by people of small means. By limiting the amount which any one person could hold, a larger number of certificates were available as investments for those of slender means, and by rendering them nontransferable and always redeemable at the amount originally paid, plus interest, it insured the holder his money and prevented traders from buying them up to the loss of the holders. To insure these objects a regulation which rendered the certificates nontransferable was quite apposite.

If I am correct in my reasoning, the scheme outlined in the indictment would cause the United States to lose money, because through the ingenious device which the defendants are charged with conspiring to carry out it might be caused to pay certificates to persons to whom it owned no obligation. It is not, however, necessary to establish a conspiracy under section 37 of the Criminal Code that the scheme would include any direct pecuniary loss to the United States. The conspiracy, if effectuated, would nullify a plan of financing which the Secretary of the Treasury adopted under the authority of law. "The statute is broad enough in its terms to include

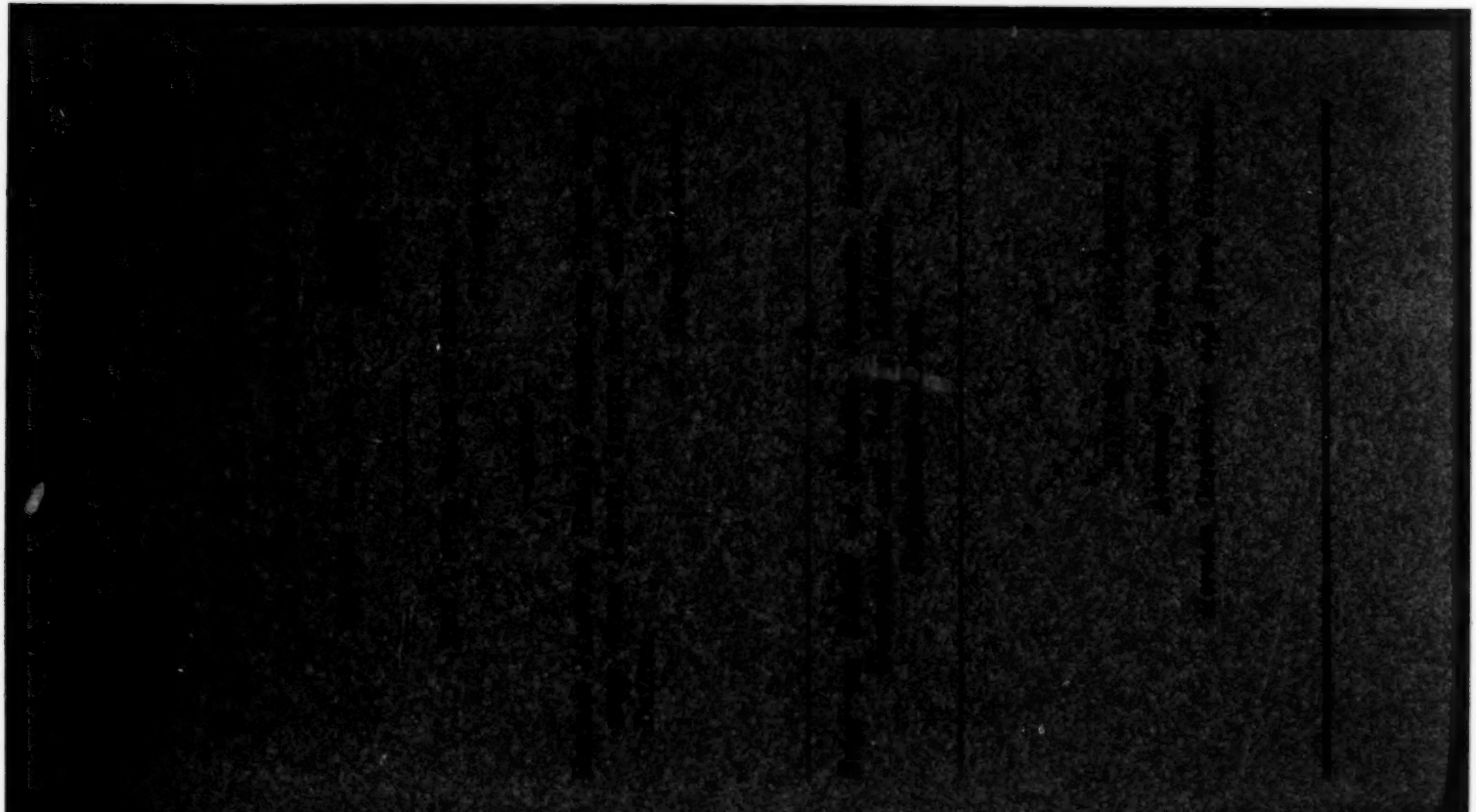
y conspiracy for the purpose of impairing, ob-
ructing or defeating the lawful function of any
epartment of government." *Haas* v. *Henkel*, 216
. S. at p. 479.

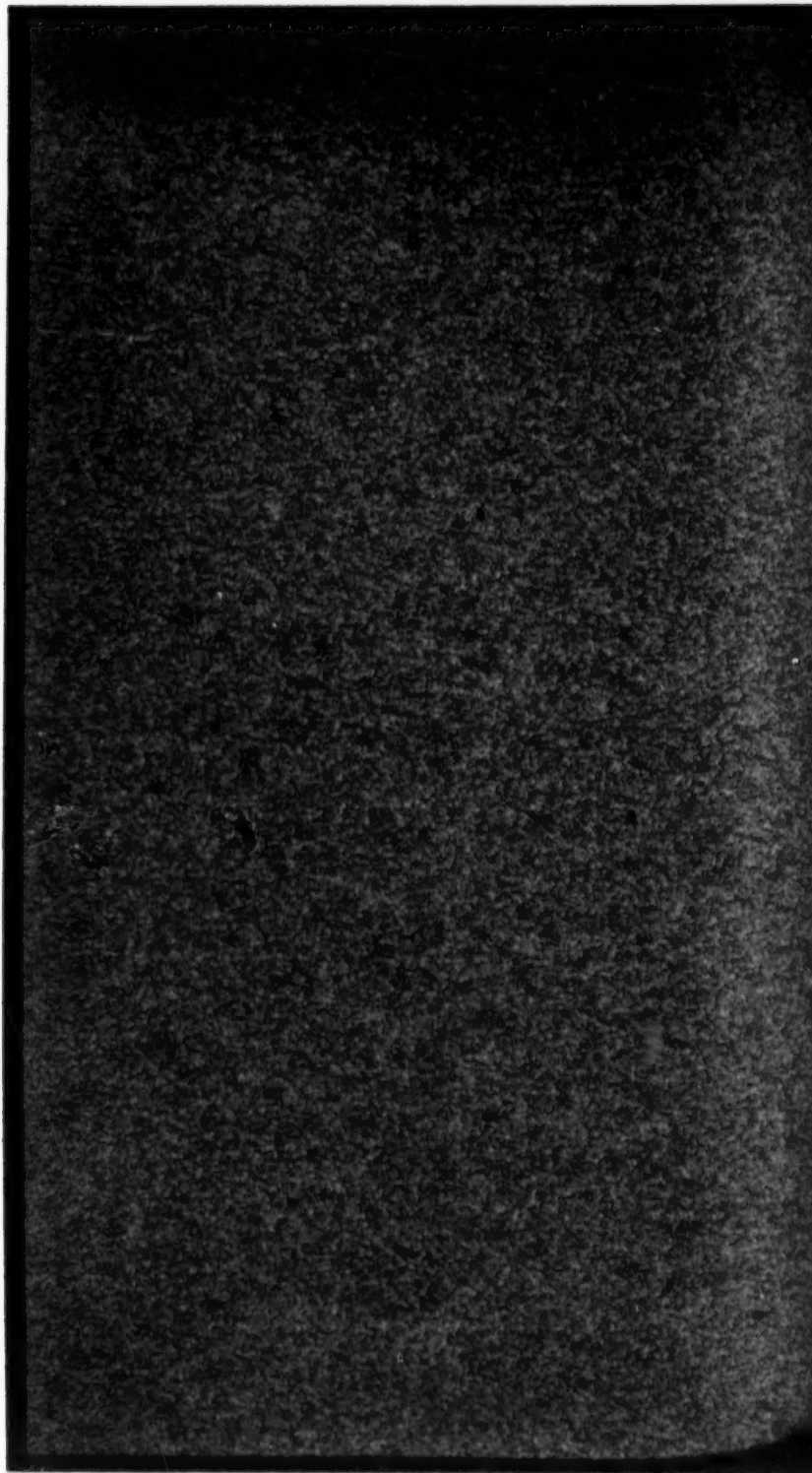
The second count is equally well conceived. The
ar-savings certificate was in esse when the stamp
ecame affixed to the certificate. To remove this
amp after the stamped certificate became the
bligation of the United States was an alteration
f an obligation of the United States.

Both counts are good and should stand.

A. N. H.
D. J.

FEBRUARY 2, 1920.





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Supreme Court,

OF THE UNITED STATES.

OCTOBER TERM, 1920.—No. 331.

THE UNITED STATES OF AMERICA,
Plaintiff-in-error,

—against—

HERMAN JANOWITZ, HERMAN OESTREICHER, HENRY GOLDSTEIN, ETTA LEVINE, JULIUS ROTH and JOHN C. DALTON,
Defendants-in-error.

Brief on Behalf of Herman Janowitz, Herman Oestreicher and Henry Goldstein, Defendants-in-Error.

ON ERROR FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

STATEMENT.

This is a writ of error to review the decree of the United States District Court for the Southern District of New York, sustaining a demurrer to an indictment found by the Grand Jurors of the United States of America for the Southern District of New York, against the defendants Herman Janowitz, Herman Oestreicher, Henry Goldstein and others (hereinafter called the defendants), on the ground that the indictment fails to allege an offense against the United States and that the indictment is insufficient in law.

The demurrer of the defendants to the indictment was sustained by the Hon. Charles M. Hough, District Judge, in an opinion handed down by him on the 27th day of

February, 1920 (R. 17 to 31). The plaintiff-in-error alleges twenty-one specifications of error in the decision of the Court in sustaining the demurrer (R. 35 to 42).

Assignments of Error.

The specifications of error are twenty-one in number. Specification number (1) is general and alleges error on the part of the Court in sustaining the demurrer. Specification number (2) relates to the First Count of the indictment, and alleges error on the part of the Court in sustaining the demurrer thereto. Specifications numbers (3) and (4) relate to the Second Count of the indictment and allege error on the part of the Court in sustaining the demurrer thereto (R. 35, 36).

Specifications numbers (5), (6), (7), (8), (9), (10), (11), (12), (13), (14) and (15) concern the allegations of the First Count to the indictment and relate to the regulations of the Secretary of the Treasury issued under and pursuant to Act, September 24, 1917, Chapter 56, Section 6, and allege error on the part of the Court in sustaining a demurrer to so much of the indictment as charges a conspiracy to violate these regulations, and which ruling of the Court held it not to be a criminal offense against the United States, for the defendants to violate these regulations and holding void and of non-legal effect such regulations, in so far as they, on the theory of the indictment, limit the inherent right and liberty of the defendants as citizens to buy and acquire these War Savings Stamps and War Savings Certificates from the origiral purchasers from the Government, and in so far as they limit the property rights of the original purchasers of these War Savings Stamps and War Savings Certificates to alienate or sell these securities, the same being their lawfully acquired property (R. 36 to 39).

Specifications numbers (16), (17), (18), (19), (20), and (21) relate to the allegations of the Second Count,

and allege error on the part of the Court in sustaining the demurrer thereto, which decision of the Court held, first, that the act of removing a stamp from one certificate and pasting it on another, in violation of Treasury regulations, was not forgery or counterfeiting within the meaning of Section 148 C. C.; and, secondly, that a conspiracy to do the same thing was not a conspiracy to violate Section 148 C. C., and therefore within the purview of Section 37 C. C. (R. 39 to 42).

The Indictment.

The indictment is in two counts, the first charging a violation of Section 37 C. C., and the second charging a conspiracy under Section 37 C. C. to violate Section 148 C. C. (R. 4 to 17). Both counts allege an attempt to defraud the Government in that certain alleged overt acts were committed by the defendants with the intention to violate certain specified regulations of the Secretary of the Treasury of the United States, issued by him on November 30, 1917, and December 18, 1918, and provided as regulations and rules governing the sale and redemption of War Savings Stamps and War Savings Certificates. The specific regulations, as set forth in the indictment, which lie at the basis of this indictment, and the legal effect of which the defendants put in issue by their demurrer are as follows:

> "That no certificate would be issued unless at the same time one or more stamps should be purchased and affixed thereto;
>
> That the name of the owner of each certificate must be written upon such certificate at the time of the issuance thereof;
>
> That said certificates were not transferable, and were payable by the United States only to the respective owners named thereon, except in case of death or disability of the owner thereof;
>
> And that the owner of a certificate at his option would be entitled, prior to maturity of said cer-

tificate, to receive at a money order post office of the United States upon surrender of his certificate to said post office in respect to each stamp then affixed to such certificate an amount fixed by the Secretary of the Treasury to be the price at which said stamps should be redeemed and during the month and the year the said certificates should be surrendered by the said owner, and that no post office should make any such payment until ten days after receiving written demand therefor;

And that upon surrender of a certificate for payment that the receipt for payment thereof, printed thereon, should be signed in the presence of the official of the United States to whom said certificate should be surrendered for payment."

The alleged violation of Section 37 C. C., by conspiring to violate these regulations of the Secretary of the Treasury, was, in a word:

(1) By conspiring to buy War Savings Stamps and War Savings Certificates from persons who had originally purchased them from the Government with the intention of obtaining payment for these certificates from the Government according to their value at the date of payment (First Count of Indictment) (R. 4 to 6).

(2) By conspiring to violate Section 148 C. C. covering forgery and counterfeiting, by conspiring to remove War Savings Stamps from War Savings Certificates purchased by the defendants from the original and lawful purchasers, in violation of these regulations of the Secretary of the Treasury, and to affix the War Savings Stamps so removed to other War Savings Certificates held by the defendants (R. 6 to 9).

The regulations in question were issued by the Secretary of the Treasury under the authority of an Act of Congress, approved September 24, 1917, entitled, "An Act to authorize an additional issue of bonds to meet expenditures for the national security and defense, and

for the purpose of assisting in the prosecution of the war, to extend additional credit to foreign governments, and for other purposes," designated in said Act of Congress as Section 6 thereof (Act, September 24, 1917, Chap. 56, Sec. 6, 40 Stat. 291).

The Statute and the Treasury Regulations Compared.

The Act of Congress authorizing the issuance of War Savings Certificates, and from which the regulations of the Secretary of the Treasury are supposed to derive force and validity, is as follows:

> "War Savings Certificates. In addition to the bonds authorized by Section One of this Act and the certificates of indebtedness authorized by Section Five of this Act, the Secretary of the Treasury is authorized to borrow from time to time, on the credit of the United States, *for the purpose of this Act and to meet public expenditures authorized by law*, such sum or sums as in his judgment may be necessary, and to issue therefor, at such price or prices and upon such terms and conditions as he may determine, War Savings Certificates of the United States, on which interest to maturity may be discounted in advance at such rate or rates and computed in such manner as he may prescribe. Such War Savings Certificates shall be in such terms and conditions, and may have such provisions for payment thereof before maturity, as the Secretary of the Treasury may prescribe. Each War Savings Certificate so issued shall be payable at such time, not exceeding five years from the date of its issue, and may be redeemable before maturity, upon such terms and conditions as the Secretary of the Treasury may prescribe. The sum of such War Savings Certificates outstanding shall not at any one time exceed in the aggregate $4,000,000,000. It shall not be lawful for any one person at any one time to hold War Savings Certificates of any one series to an aggregate amount

> exceeding $1,000. The Secretary may, under such regulations and upon such terms and conditions as he may prescribe, issue, or cause to be issued, stamps to evidence payments for or on account of such certificates" (Act, September 24, 1917, Chap. 56, Sec. 6, 40 Stat., 291).

The prior prohibition that it was unlawful to sell more than $100.00 worth at any one time to any one person, was repealed by the amendment of September 24, 1918. Section 2 of Chapter 176 of the Act of September 24, 1918, provides:

> "Such section is further amended by striking out the words 'the amount of War Savings Certificates sold to any one person at any one time shall not exceed $100.00 and it shall not be lawful for any one person at any one time to hold War Savings Certificates to an aggregate amount exceeding $100.00' and inserting in lieu thereof the words, 'It shall not be lawful for any one person at any one time to hold War Savings Certificates of any one series to an aggregate amount exceeding $1,000.00.'"

The authority given to the Secretary of the Treasury to make regulations concerning these War Savings Certificates are in the following words:

> "Such War Savings Certificates shall be in such form or forms and subject to such terms and conditions, and may have such provisions for the payment thereof, before maturity, as the Secretary of the Treasury may prescribe. Each War Savings Certificate so issued shall be payable at such time, not exceeding five years from the date of its issue, and may be redeemable before maturity, upon such terms and conditions as the Secretary of the Treasury may prescribe."

The regulations for alleged violation of which this indictment is brought derive their legal effect and validity solely and exclusively from these clauses.

THE ACTS WHICH THE DEFENDANTS ARE CHARGED, IN THE INDICTMENT, TO HAVE CONSPIRED TO COMMIT, AND UPON WHICH IT IS SOUGHT TO PREDICATE THE CRIME OF CONSPIRACY TO DEFRAUD THE UNITED STATES, ARE THESE:

(1) To purchase War Savings Certificates with stamps affixed, from persons other than the Secretary of the Treasury, i. e., from individual holders, bona fide purchasers thereof.

(2) To obtain a number of blank War Savings Certificates in excess of $100.00 (but it is not stated whether defendants planned to obtain these blank certificates from the Post Office or other duly accredited representatives or from private persons; nor is there alleged an attempt or conspiracy to attempt to bribe any of the employees of the Treasury Department or of the Post Office).

(3) To transfer the stamps from the purchased certificates to the blank certificates.

(4) To write upon the blank certificates the names of persons other than the names of the defendants.

(5) To present the certificates with the transferred stamps affixed for redemption to the Post Office (R. 4 to 17).

So much of the allegations of the indictment as allege a conspiracy to obtain an amount of War Savings Certificates in excess of $100.00 cannot be considered by the Court as the proviso that one person at one time should not be sold an amount to exceed $100.00, was specifically repealed by Act of September 24, 1918, Section 2, 40 Stat., as set forth above, and the alleged overt act committed by the defendants in pursuance of the alleged conspiracy, was during the months of August and September in the year 1919 (R. 10).

Summing up, the manner in which the defendants are alleged to have committed a criminal offense against the United States by violating the regulations of the Secretary of the Treasury in conspiring to purchase War Savings Stamps and War Savings Certificates from the original purchasers (not authorized by the United States Government to sell) and to receive payment thereof from the United States Government, with knowledge of these Treasury regulations prohibiting alienation or sale of these stamps and certificates by the original purchasers, and acquisition of these stamps and certificates from the original purchasers by other citizens, and conspiring to remove stamps from these purchased certificates and to paste them on others held by the defendants, and to cause such blank certificates so prepared by them to be presented to a Post Office of the United States for payment.

The only limitation expressed in the statute, the violation of which would be unlawful, is the following clause:

> "It shall not be lawful for *any one person at any one time to hold* War Savings Certificates of *any one series* to an aggregate amount exceeding $1,000."

Even this prohibition does not declare "holding" of more than $1,000 worth to be a crime nor does it make buying and selling of these Stamps and Certificates a crime. And what is more to the point, *it does not prohibit purchase and sale of these securities.*

This clause allows any one person to hold War Savings Certificates up to the amount of $1,000 at one time in one series. When such $1,000 worth in one series is redeemed *or otherwise disposed* of, the plain wording of the statute allows the same individual to *acquire* other War Savings Certificates up to an amount not exceeding $1,000 at one time in one series. This process of purchase, and redemption or *alienation*, may

be repeated indefinitely within the limitation thus prescribed. *Nowhere in the statute does there appear any legislative proviso prohibiting alienation of War Savings Certificates and War Savings Stamps thus purchased and held by the original purchasers, nor does the statute prohibit, in terms, or inferentially, the acquisition of these War Savings Certificates and War Savings Stamps by other parties by purchase from the original purchasers from the Government.* Alienation by original purchasers or acquisition from such original purchasers is not declared to be unlawful, or a crime, either by express provisions or by necessary implication.

On the other hand, the Treasury regulations as set forth in the indictment *place a specific restriction both on alienation and acquisition of these War Savings Certificates after the initial purchase thereof by citizens.* The power to so restrict in the sense that a violation of such regulations is a penal offense, nowhere appears in the statute conferring the authority upon the Secretary of the Treasury to issue the War Savings Certificates and Stamps and to make regulations concerning them. *The statute does not make penal a violation of any regulation of the Secretary of the Treasury or provide penalties for the violation thereof.*

Since the statute conferring authority on the Secretary of the Treasury to issue War Savings Stamps and Certificates did not limit alienation by the purchasers or acquisition from such purchasers by other persons, the power to make regulations as granted by the enabling act was limited to purely administrative rules and regulations, and without an express proviso in the Congressional Enactment making it a criminal offense to violate such regulations, they cannot have penal effect, or the force and effect of law so as to form the basis of an indictment. Otherwise the obvious effect of the Treasury regulations if given effect to, would be to amend the statute granting authority to issue such War Savings Certificates and Stamps.

The Issues.

The issues, therefore, are:

1. Whether in a case where the enabling Act of Congress does not prohibit sale and purchase of these War Savings Stamps and War Savings Certificates by and between citizens, and does not make such sale and purchase a criminal offense, a regulation of an executive officer acting under the authority of the Act of September 24, 1917, Section 6, prohibiting such sale and purchase, can have the force and effect of law, so as to render persons who conspire to purchase such War Savings Stamps and Certificates in violation of such regulations guilty of conspiracy to defraud the government under Section 37 C. C.: and

(2) Whether after such purchase of War Savings Stamps and War Savings Certificates from their original purchaser, it is a forgery or counterfeiting within the meaning of Section 148 C. C. to remove War Savings Stamps from some War Savings Certificates and paste them on others in violation of regulations issued by the Secretary of the Treasury, and whether a conspiracy to do that same thing is a conspiracy under Section 37 C. C. to violate Section 148 C. C.;

Or, stating the two questions as one in other and more general language:

Whether regulations, prescribed by an executive head of a department under authority granted by Congress, requiring or prohibiting a thing to be done shall have the effect of law so as to make their violation a criminal offense, where the enabling statute does not distinctly make their violation a criminal offense, or affix a penalty for such violation?

Argument.

POINT I.

Regulations of the Secretary of the Treasury of November 30, 1917, and December 18, 1918, issued under the authority of Act of September 24, 1917, Chapter 56, Section 6, and Act of September 24, 1918, Section 2, 40 Stat. are void in so far as they destroy vested property rights of the original purchasers to alienate and otherwise deal with these securities after a lawful purchase, and in so far as they destroy the inherent right of citizens to purchase, acquire and otherwise deal with such securities after a lawful purchase from the Government.

The courts are not blind to what the community knows generally, the creation and sale of War Savings Stamps and Thrift Stamps were for the purpose of inducing investors of very small means to loan their money to the government and to receive therefor obligations of the government. For sixteen Thrift Stamps sold at twenty-five cents each, the purchaser thereof might exchange them for a five dollar War Savings Stamp, together with a War Savings Certificate which had places thereon for twenty five dollar stamps, which might be redeemed at a later date upon presentation to the Post Office. Every time a person either exchanged sixteen thrift stamps or bought and paid for a five dollar War Savings Stamp, he might properly request and receive a blank War Savings Certificate.

It was the custom for banks and other persons possessing such certificates and War Savings Stamps, to deliver to anyone paying therefor or exchanging Thrift Stamps therefor, a certificate which was in all respects, a blank one, and a War Savings Stamp which might

be affixed to that certificate or to a certificate already in the possession of the purchaser. These War Savings Stamps and the Thrift Stamps which may be exchanged for them, have been issued in large quantities, have been sold by all kinds of persons, and have for some years now, passed from hand to hand like other pieces of personal property.

It is now sought, by means of Treasury regulations, to write an entirely new law—a law which would hinder and obstruct persons from the exercise of the valuable property right which such persons have exercised in the full belief of its propriety for some years past. In other words, the matter of the purchase, sale, barter and exchange of War Savings Stamps and War Savings Certificates has become popularly recognized as a legitimate and lawful business, and vast quantities of these stamps and certificates have been issued to persons and transferred by them to others without the slightest suspicion on their part that they were doing acts which would subject them, under the United States Criminal Code, to imprisonment for two years, or a fine of Ten Thousand Dollars. The government now seeks to change what has become a well recognized custom, and to make the doing of acts innocent in themselves, a crime.

The second count of the indictment alleges that the defendants conspired to violate Section 148 C. C. in that they conspired to purchase certificates of the series both of 1918 and 1919 from persons not authorized to sell the same by the Secretary of the Treasury; that they also conspired to obtain War Savings Certificates to which stamps had never been affixed and on which no owner's name had ever been written, and have intended and agreed to detach the stamps from the purchased certificates and affix the same to the blank certificates, to the end that in the name of some person other than the defendants, the certificates might be presented for redemption at a Post Office. Thus the defendants are

accused of conspiring to violate what is usually called the counterfeiting or forgery statute.

The first count of the indictment charges under Section 37 C. C., a conspiracy to defraud the United States by doing exactly the same things as are specified in the second count to constitute a conspiracy to commit an offense under Section 148 C. C.

Like every other proceeding under an indictment, this indictment must rest, both in form and in substance, on a foundation or substructure of law. The substructure of law, in the sense of an Act of Congress, upon which this prosecution relies, is the language of Section 6 of the Act of September 24, 1917, as amended by Section 2 of Act of September 24, 1918, which is the statute that authorized the issue of what are commonly known as War Savings Stamps and War Savings Certificates. Under this enabling statute, certain regulations which the defendants are accused of conspiring to violate, were issued by the Secretary of the Treasury under date of November 30, 1917 and December 18, 1918. The theory of the indictment is that these regulations have the force and effect of law so as, in connection with the enabling act, to form the basis of this indictment.

A.

The theory of the indictment and the preferred argument of the government as to the legal effect of these regulations on these securities, is that although War Savings Stamps are property in the ordinary sense of the word and may pass from hand to hand like any other similar piece of property, this property has no value in and of itself; it is but a receipt for a certain amount of money; but when it is affixed not to *any* certificate of the corresponding series, but to a certificate bearing the name of the person who obtained it from an

agent of the Treasury and still owned by that person, it becomes an integral irremovable portion of an indissoluble obligation of the United States. In other words, the government contends that the legal result of the executive rule, "Thou shalt not transfer certificates and stamps or either" is that the stamp was merged in the certificate on being affixed thereto with the name of the original purchaser inscribed on said certificate; it became an integral unit, and defendants are forgers or counterfeiters if they remove the stamp so affixed and guilty of conspiracy to do the same thing, if they act in concert; the purchasers have no property in the certificate as separated from the stamp, and they have no property in the stamp as separated from the certificate, but when the stamp and certificate are both put together, the only property such persons have is to keep the stamps and certificates themselves. As to the transfer or sale of these securities, the proposition contended for by the government, baldly put, is that purchased certificates and the stamps affixed thereto were worthless for any purpose in the hands of the purchaser, no matter whether the amount of such purchased certificates was small or great; the theory is that, once affixed to a certificate, the united stamp and pasteboard become sacrosanct and could not be disunited; that the moment such legal entity passes from the hand of the original owner (by purchase at all events) to the hand of another, it crumbles into legal dust and becomes, in the language of the indictment, "worthless in their hands" (i. e., the purchaser's hands) and so worthless that payment could never become due either "at or before maturity."

B.

If the regulations in question are held to have the force and effect of law, it necessarily follows, as to the alleged crime of conspiracy to buy stamps and to remove

War Savings Stamps from the purchased certificates, that:

(1) It is as much unlawful and a crime for original purchasers to sell or otherwise alienate such purchased War Savings Stamps and War Savings Certificates, as it is for defendants to buy them; and

(2) It is as much counterfeiting and forgery to put a transferred stamp on a certificate as it is to detach a stamp from a certificate and thereby alter the same.

It also follows that in the absence of any specific prohibition by Act of Congress on the acts of purchase and sale, the regulations if given the force and effect of law, would be an amendment to the enabling statute in substantially the following terms:

1. It shall not be lawful for any one person to purchase more than One Hundred Dollars worth of War Savings Certificates at one time.

2. *It shall not be lawful for original purchasers to sell or alienate these War Savings Certificates.*

3. *It shall not be lawful for any one to purchase these War Savings Certificates from the original purchaser.*

4. If any person shall purchase these War Savings Certificates from the original owner it shall not be lawful for such holder to obtain and receive payment.

5. These War Savings Certificates are non-transferable, payable only to the original purchasers and no other holder, however he has acquired said War Savings Certificates, may lawfully receive payment except in case of death or disability of the original purchaser.

6. No holder of these War Savings Certificates with War Savings Stamps affixed may lawfully remove any of such affixed stamps or paste any of such stamps so removed, on other certificates.

Considering for a moment the necessary implications of these amendments, which the regulations, if held to have the force of law, would make to the statute, we find that the regulations would prevent the following transfers by and between citizens:

(1) *By purchase and sale.*

(2) By assignment for the benefit of creditors in bankruptcy.

(3) In attachment suits.

(4) Execution and satisfaction of judgment.

(5) When it is sought to recover money wrongfully converted and invested in War Savings Stamps and certificates under the equitable doctrine of "following the *res*."

(6) In foreclosure under chattel mortgages where such stamps and certificates have been hypothecated for loans.

It becomes apparent that if these regulations of the Treasury which are dependent upon the whim of some particular administrator, shall be held to be such regulations as are naturally and necessarily contemplated by the act under which they are purported to be issued and that their violation is *ipso facto* criminal, then the gift by a father to his child of some of the father's War Savings Stamps or Certificates, is unlawful and puts

them both in danger of fine and imprisonment. If a person, desiring to secure immunity from paying his bills, invests his money in War Savings Stamps, he is immune from the attack of his creditors either at law, in equity, by attachment, execution or under the bankruptcy statute. A bank which has loaned money upon the pledge of War Savings Stamps and War Savings Certificates as security therefor will henceforth be unable to realize on its security in the event that the borrower defaults in the payment of his loan. Property rights will be destroyed and persons of the highest character and reputation will be liable to indictment and prosecution.

C.

This is the gist of the matter: *Is a regulation which as interpreted in terms takes away a property right in a manner not specifically authorized by statute, a valid rule?*

It is submitted that the exchange, sale or barter of War Savings Stamps is a perfectly lawful business under the strictest letter of the enabling statute.

The purpose of the enabling act as stated in the title and as explained above, was to obtain revenue. This purpose was effectuated when the original purchasers paid to the government the price demanded for War Savings Stamps. These stamps became the property of such original purchasers just like other species of personal property or other government securities. It is a commonplace of American constitutional law, *that the right to alienate property* or property rights lawfully acquired from the Government of the United States, by sale or otherwise, *or to use such property as the owner sees fit*, is an essential element in the ownership of property and the exercise of such rights cannot be made in

any wise unlawful in the absence of an express Congressional statutory enactment.

> *Thredgill* v. *Pintard*, 12 How. 24 (1851);
> *Myers* v. *Croft*, 13 Wall. 291 (1871);
> *Adams* v. *Church*, 193 U. S. 511 (1904);
> *United States* v. *Williamson*, 207 U. S. 425, 458 (1908).

Moreover, the right to acquire property is inherent in the citizen and may not be limited except by express legislation of Congress.

> *Morrill* v. *Jones*, 106 U. S. 466 (1882);
> *U. S.* v. *Williamson*, 207 U. S. 425, supra.

Within the rule thus stated, the right of lawful owners to sell their War Savings Stamps and Certificates, as in the case of other property lawfully acquired from the government by purchase or otherwise, and the right to use such property as the owner sees fit, are property rights; and the right of other citizens to buy such property is a natural right and its exercise may not be limited or made unlawful unless a statute so provides in specific terms, and the enabling statute in question does not make the purchase and sale of these stamps and certificates unlawful.

D.

It is not disputed that Congress has the power to impose such limitations on the ownership of these securities or upon the liberties of the citizen, but it is submitted that Congress has not done so in the enabling statute and they may not therefore be imposed by executive amendment.

> *Myers* v. *Croft*, 13 Wall. 291, supra;
> *Morrill* v. *Jones*, 106 U. S. 466, supra;
> *Adams* v. *Church*, 193 U. S. 511, supra;
> *United States* v. *Williamson*, 207 U. S. 425, supra.

In *Adams* v. *Church*, 193 U. S. 511, at page 576, Mr. Justice Day thus states the rule:

> "If the entryman has complied with the statute, and made the entry in good faith, in accordance with the terms of the law, and the oath required of him upon making such entrance, and has done nothing inconsistent with the terms of the law, we find nothing in the fact that during his term of occupancy defendant agreed to convey an interest to be conveyed after patent issue, which will defeat his claim and forfeit the right acquired by planting the trees and complying with the terms of the law. Had Congress intended such result to follow from the alienation of an interest after entry in good faith, it would have so declared in the law."

United States v. *Williamson*, 207 U. S. 425, was a case involving such executive regulation. It was held that Congress had given the Land Commissioner power to prescribe regulations to give effect to the Timber and Stone Act, but the rule prescribed must be for the enforcement of the statute and not destructive of the rights which Congress has conferred by the statute; that under the Timber and Stone Act of June 30, 1878, 20 Stat. 89, an applicant is not required after he has made his preliminary sworn statement concerning the bona fides of his application and the absence of any contract or agreement in respect to the title, to additionally swear to such facts on final proof, and a regulation of the Land Commissioner exacting such additional statement at the time of final hearing, is invalid. The Court said, at pp. 461-462:

> "It remains only to consider whether it was within the power of the Commissioner of the General Land Office to enact rules and regulations by which entrymen would be compelled to do that at the final hearing which the act of Congress must be considered as having expressly excluded, in order thereby to deprive the entryman of a

> right which the Act by necessary implication conferred upon him. To state the question is to answer it, as observed in *Adams* v. *Church* (supra), at page 517, 'to sustain the contention * * * would be to incorporate * * * a prohibition against alienation of an interest in the lands, not found in the statute or required by the policy of the law on the subject.' True it is that in the concluding portion of Section 3 of the Timber and Stone Act it is provided that 'effect shall be given to the foregoing provisions of this Act by regulations to be prescribed by the Commissioner of the General Land Office.' But this power must in the nature of things be construed as authorizing the Commissioner of the General Land Office to adopt rules and regulations for the enforcement of the statute, and cannot be held to have authorized him, by such an exercise of power, to virtually adopt rules and regulations destructive of rights which Congress had conferred."

And as this Court in *Myers* v. *Croft*, 13 Wall. at page 297, observes:

> "If it had been the purpose of Congress to attain the object contended for, it would have declared the lands themselves inalienable until the patent was granted."

The Act does not expressly forbid selling by the purchaser or purchase from such original purchaser by other persons of the War Savings Certificates and Stamps. It would seem that it is not unlawful to purchase or sell War Savings Certificates within the limitations laid down in the enabling act.

We accordingly apply the rule first set forth in *Myers* v. *Croft*, supra, to the effect that Congressional intent to make alienation by sale and acquisition by purchase of War Savings Stamps and War Savings Certificates from the original owner or other than Government agents unlawful, may not be presumed in the absence of express provisions in the statute. Since Congress did not

specifically forbid alienation and acquisition of War Savings Stamps and War Savings Certificates, nor declare the sale and purchase of such securities by and between citizens to be unlawful, the regulations in question in so far as they would make the purchase and sale of these securities by and between the lawful owners and other citizens unlawful, are in the nature of an amendment to the statute and a limitation of rights of citizens under and in respect to the enabling statute, and are therefore void.

Morrill v. *Jones*, 106 U. S. 466, supra;
United States v. *Eaton*, 144 U. S. 677 (1892).

In *Morrill* v. *Jones*, 106 U. S. supra, Section 2505 of the Revised Statutes provided, among other things, that "animals, alive, specially imported for breeding purposes from beyond the seas shall be admitted free of duty upon proof thereof satisfactory to the Secretary of the Treasury *and under such regulations as he may prescribe.*"

Article 383 of the Treasury Customs regulations provided that before a collector admits such animals through he must, among other things, "be satisfied that the animals are *of superior stock*, adapted to improving the breed in the United States." Jones imported certain animals for breeding purposes, which was conceded, but duty was required to be paid, because the animals were of inferior stock, under Article 383 of the Treasury regulations.

It was held that the Secretary of the Treasury had no authority to prescribe such a regulation. The Court, at page 467, speaking through Chief Justice Waite, said:

> "The Secretary of the Treasury cannot by regulations alter or amend the revenue law. All he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted. In the present case we are entirely satisfied that the

> regulation acted upon by the collector was in excess of the power of the Secretary. The statute clearly includes animals of all classes. The regulation seeks to confine its operation to animals of 'superior stock.' *This is manifestly an attempt to put into the body of the statute a limitation which Congress did not think it necessary to prescribe.* Congress was willing to admit duty free all animals as were adapted to the improvement of breeds in the United States. In our opinion the object of the Secretary could only be accomplished by an amendment of the law. *That is not the office of a Treasury regulation.*"

In *United States* v. *Eaton*, 144 U. S. supra, at page 688, the Court said:

> "Regulations prescribed by the President and by the heads of departments, under authority granted by Congress, may be regulations prescribed by law, so as lawfully to support acts done under them and in accordance with them, and may thus have, in a proper sense, the force of law; but it does not follow that a thing required by them is a thing so required by law as to make them neglect to do the thing a criminal offense in a citizen where a statute does not distinctly make the neglect in question a criminal offense."

Thus far, the results of sustaining the indictment herein have been considered solely from the standpoint of (1) the effect of such a rule upon the property rights of the original lawful purchasers of these War Savings Stamps and War Savings Certificates from the Government and upon the inherent rights of other citizens to acquire said property; and (2) the statutory power of the Secretary of the Treasury to destroy such vested property rights and such liberties of the citizens.

Summarizing the legal argument in support of the underlying proposition, namely, that the regulations in question in so far as they would have the effect shown

are *ultra vires* the powers of the Secretary of the Treasury under the enabling act, we urge for the consideration of this Court on this appeal the following indisputable rules of law:

1. When the War Savings Stamps and Certificates were purchased without express Congressional limitation on the right of alienation, that right existed (*Thredgill* v. *Pintard*, 12 How. 24, supra; *Myers* v. *Croft*, 13 Wall. 291, supra).

2. The Government has no property right or proprietary interest in the War Savings Stamps and Certificates after they have been lawfully purchased from the Secretary of the Treasury. After these securities have been sold to lawful purchasers for value, they become the sole property of such purchasers. The Government's rights in such stamps and certificates, its property therein, is relinquished for value. In the absence of an express statutory enactment, the right of such lawful owners is thereafter absolute, and the exercise of all or any of the incidents of ownership may not be made unlawful by a mere executive regulation (*Meyers* v. *Croft*, 13 Wall. 291, supra; *Adams* v. *Church*, 193 U. S. 511, supra; *United States* v. *Williamson*, 207 U. S. 425, supra).

3. As the Secretary of the Treasury may not alter or amend a law (*Morrill* v. *Jones*, 106 U. S. 466, supra; *United States* v. *Eaton*, 144 U. S. 677, supra).

4. Nor may the Secretary of the Treasury limit or prohibit the inherent right of a citizen to lawfully acquire property in the absence of a statutory enactment (*Morrill* v. *Jones*, 106 U. S. 466, supra; *United States* v. *Williamson*, 207 U. S. 425, supra).

E.

The right to "detach from the face of the purchased certificates the purchased stamps and so to alter the said purchased certificates and to affix the said purchased stamps to blank certificates" is a right of user, i. e., *jus utendi*, one of the elements comprising the original purchaser's and the defendants' property in these securities, and its exercise is valid as an incident of ownership. A limitation on this right of user is as much a destruction of a property right of the lawful owners of these stamps and certificates as the restraint on alienation, and is void within the rules laid down in the cases discussed above.

It is urged that sufficient statutory authority exists to thus destroy such right of user by executive fiat; that the proviso in the Act, to the effect "that the Secretary might issue stamps to evidence payments for or on account of such certificates" made the certificate the obligation of the United States and the stamp merely a method of fixing the amount of said obligation. This reasoning assumes that the Secretary in issuing these securities either was ignorant of the terms of the enabling act or chose to disregard them. The Act provides that:

> "The Secretary of the Treasury is authorized to borrow from time to time, on the credit of the United States, * * * such sum or sums as in his judgment may be necessary, and to issue therefor, at such price or prices and upon such terms and conditions as he may determine, War Savings Certificates of the United States on which interest to maturity may be discounted in advance * * *"

The certificates mentioned in the indictment are not issued for any price and do not bear any interest and may not be discounted at or before maturity, as witness: "No additional charge will be made for the War Savings

Certificate itself" (Treasury Regulation, December 18, 1918, Rule 1).

It appears from this regulation that any purchaser of a War Savings Stamp has a right to obtain a certificate without giving value to the Government therefor. This Court will not assume, tacitly or otherwise, that the War Savings Stamps were issued by the Secretary of the Treasury other than according to the powers conferred or in the mode prescribed by the enabling act. The argument of the Government necessarily assumes that although the enabling act authorizes the Secretary of the Treasury "to borrow from time to time on the credit of the United States * * * such sum or sums as in his judgment may be necessary and to issue therefor * * * War Savings Certificates of the United States, on which interest to maturity may be discounted in advance at such rate or rates and computed in such manner as he may prescribe," the Secretary of the Treasury issued certificates within the meaning of the Act, without receiving value therefor, and on which interest could not be discounted in advance as required by the enabling statute. That this assumption is erroneous, and arises from a mere confusion of terminology on the part of counsel for the prosecution, is apparent on a consideration of the facts.

For sixteen thrift stamps, sold at twenty-five cents each, the purchaser thereof might exchange them for a five dollar war savings stamp, together with a war savings certificate, which had places thereon for twenty of the five dollar war saving stamps, which stamps might be redeemed at a later date upon presentation to the post office. Every time a person either exchanged sixteen thrift stamps or bought and paid for a five dollar war savings stamp, he might properly request and receive a blank war savings certificate. *These thrift stamps were not redeemable;* only the five dollar stamps were redeemable. The thrift stamps thus became "evidences of payment for and on account of such certificates", i. e.,

five dollar war savings stamps, which later bear interest and are discountable and redeemable at or before maturity. Under the method and designation used by the Secretary of the Treasury in issuing these securities, the five dollar war savings stamp is the "certificate" within the plain meaning and intendment of the act. The piece of paper called a "certificate" in the indictment and in the brief on behalf of the government is misnamed within the declared intent and meaning of the statute. It appears to be a mere holder for certificates, i. e., five dollar stamps, and given to purchasers of such stamps for their personal convenience merely.

That the Secretary did not consider the certificates (so called) the "certificate" intended by the statute is shown by the fact that he issued them without cost to owners of five dollar stamps, when the act specifically provided that certificates should be issued for sums borrowed pursuant to its authority, which further strengthens the construction here contended for. Another fact also shows this to be the proper construction, to wit, since these holders (called certificates) are issued free and are in themselves valueless, the five dollar stamps cannot evidence payment on account of such holders.

The proviso that these holders (here called certificates) were "not a valid obligation of the United States unless a War Savings Certificate stamp was attached to it" was obviously set forth in the regulations out of an abundance of caution; to prevent persons being misled as to the value of these certificates, i. e., holders, and is in accord with the construction here urged. These certificates or holders were issued in blank and without value to a purchaser of a five dollar stamp (the statutory certificates). The five dollar stamp is thus seen to be the unit of value and when attached to the holder, gave the latter, in a sense, value to that amount. Without being thus attached, the five dollar stamp is still worth five dollars at maturity. On the other hand, without one or more such five dollar stamps

attached the holder is worth nothing. The proviso above referred to, is thus seen, on analysis and reflection, to be a spelling out of the legal qualities of these certificates (i. e., holders), and a definitive statement that they in themselves are mere holders, given for convenience of holders of the statutory certificates, i. e., the five dollar stamps, and are not "obligations of the United States" within the purview of Section 148 C. C., commonly called the forgery or counterfeiting statute.

Thus construed, the issuance of the thrift stamps and five dollar stamps are clearly in accord with the delegation of power in the Act of September 24, 1917, and as amended in Act, September 24, 1918. It is axiomatic that this Court will give to the acts of the Secretary of the Treasury a scope and meaning which makes them *infra vires* the powers conferred in the enabling act, rather than a meaning which makes such acts *ultra vires* the statutory powers conferred, if the former is possible.

In this connection it must be borne in mind that there is no charge in the indictment that the defendants conspired to alter the five dollar stamps (the statutory certificates) or the thrift stamps (stamps to evidence payments for or on account of such statutory certificates).

The conclusion is irresistible that the defendants cannot be convicted of a conspiracy to violate Section 148 C. C., covering forgery or counterfeiting, when the allegation that "the said purchased certificates were obligations of the United States as the defendants then and there well knew" (R. 14) rests upon such a misconstruction of the meaning and scope of the act, and of the proper meaning and legal quality of the acts of the Secretary of the Treasury in issuing War Savings Stamps and Certificates; that is to say, the misapplication of the words "certificate" and "stamp" may not result in the manufacture of a crime to fit such words as thus misused.

Moreover, this statute does not make it unlawful to remove the five dollar stamps (statutory certificates) from some of the "holders" and paste them on others. At the bottom of the charge that such acts are unlawful lies the Treasury regulation which says that the certificate was not a valid obligation of the United States unless a War Savings Stamp was attached to it. From which statement the government argues that the holders were made "obligations of the United States" from which the removal of a stamp in the manner alleged, or mayhap to paste one on, constitutes the offense denounced by Section 148 C. C., and that to conspire to do those things is to conspire to violate Section 148 C. C. Apart from the fact that this reasoning is based on the misconstruction and misapplication of the words "stamp" and "certificate" and a misreading of the statutory powers conferred on the Secretary of the Treasury as above referred to, and even on the assumption that the Secretary of the Treasury intended his regulations to have the effect contended for, it is submitted that the Secretary cannot by his *ipse dixit*, make the certificates, i. e., holders, obligations of the United States within the purview of Section 148 C. C. The power is not conferred in the enabling act, and if the regulation of the Secretary be given the effect contended for, it is by so much an amendment or alteration of the enabling act and therefore void.

> *Morrill* v. *Jones*, 106 U. S. 466, supra;
> *United States* v. *Eaton*, 144 U. S. 677, supra;
> *United States* v. *Williamson*, 207 U. S. 425, supra.

It only remains to consider (on the assumption that the regulations do go as far as above indicated and that the executive intent was to make their violation criminal), whether such regulations, so interpreted, are within the sattutory power of the Scretary of the Treasury.

POINT II.

The regulations of the Secretary of the Treasury of November 30, 1917, and December 18, 1918, issued under the authority of Act, September 24, 1917, Chapter 56, Section 6, and Act, September 24, 1918, Section 2, 40 Stat., cannot make the acts forbidden by them, criminal offenses against the United States even when read in connection with Section 37 C. C. and Section 148 C. C., in the absence of a specific proviso in the enabling Act of Congress declaring the violation of such regulations to be a criminal offense and affixing a penalty therefor.

A.

There are no common law offenses against the United States. Any offenses which may be the subject of a criminal proceeding in a Court of the United States must be an act committed or omitted in violation of a public law of the United States, either prohibiting or commanding it.

United States v. *Hudson*, 7 Cranch 31 (1812);
U. S. v. *Coolidge*, 1 Wheat, 415 (1816);
U. S. v. *Wiltberger*, 5 Wheat, 76 (1820);
U. S. v. *Britton*, 108 U. S. 199 (1883);
Manchester v. *Massachusetts*, 139 U. S. 240 (1891);
U. S. v. *Eaton*, 144 U. S. 677 (1892);
U. S. v. *Todd*, 158 U. S. 278 (1895);
U. S. v. *Williamson*, 207 U. S. 425 (1908).

"A public law of the United States within the rule *is an act of Congress* specifying what acts are prohibited or commanded."

4 Amer. & Eng. Ency. of Law, 642;
4 Blackstone's Com., 5;
U. S. v. *Eaton*, 144 U. S. 677; 687-688 (supra).

The statute in question does not in express terms make it a crime to alienate or acquire by purchase War Savings Stamps and War Savings Certificates, nor does it make it a crime for the lawful owners of such stamps and certificates to transfer stamps from one certificate to another. The statute does not declare it to be an offense against the United States to violate the regulations of the Secretary of the Treasury made under and pursuant to authority conferred therein, nor does it affix a penalty for such violation. The regulations, for a conspiracy to violate which the defendants were indicted, purport to be issued by virtue of the power conferred on the Secretary of the Treasury to issue these securities "subject to such terms and conditions" as he may prescribe. It is urged by the Government that power to make "terms and conditions" so conferred is sufficient to make it a criminal offense to violate any rule thereafter to be made by the Secretary of the Treasury, under the statute, for the carrying out of the purpose of the statute; or at all events, as the indictment is laid, for the defendants to conspire to violate such rules and regulations.

B.

In considering the validity of this contention a review of the authorities relating thereto is pertinent. The leading criminal case on the question is *United States* v. *Eaton*, 144 U. S. 677 (1892). The defendant in that case was indicted for violating a regulation of the Commissioner of Internal Revenue, under Sec. 20 of the Act of August 2, 1886, C. 840 (24 Stat. 209), requiring wholesale dealers in oleomargarine to keep a book, and make a monthly return, showing certain prescribed matters. A demurrer to the indictment was sustained, the Court holding that a violation of the regulation in question was not an omission or failure to do a thing required by law, so as to constitute a criminal offense. The Court, speak-

ing through Mr. Justice Blatchford, laid down sound criteria for judging of the scope and validity of executive regulations (p. 687-688):

> "It is well settled that there are no common law offenses against the United States. *United States* v. *Hudson*, 7 Cranch, 32; *United States* v. *Coolidge*, 1 Wheat 415; *United States* v. *Britton*, 108 U. S. 199, 206; *Manchester* v. *Massachusetts*, 139 U. S. 240, 262, 263, and cases there cited.
>
> "It was said by this court in *Morrill* v. *Jones*, 106 U. S. 466, 467, that the Secretary of the Treasury cannot by his regulations alter or amend a revenue law, and that all he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted. Accordingly it was held in that case, under Sec. 2505 of the Revised Statutes, which provided that live animals specially imported for breeding purposes from beyond the seas should be admitted free of duty, upon proof thereof satisfactory to the Secretary of the Treasury and under such regulations as he might prescribe, that he had no authority to prescribe a regulation requiring that, before admitting the animals free, the collector should be satisfied that they were of superior stock, adapted to improving the breed in the United States.
>
> "Much more does this principle apply to a case where it is sought substantially to prescribe a criminal offense by the regulation of a department. It is a principle of criminal law that an offense which may be the subject of criminal procedure is an act committed or omitted 'in violation of a public law, either forbidding or commanding it.' 4 American & English Encyclopedia of Law, 642; 4 Bl. Com. 5.
>
> "It would be a very dangerous principle to hold that a thing prescribed by the Commissioner of Internal Revenue, as a needful regulation under the oleomargarine act, for carrying it into effect, could be considered as a thing 'required by law' in the carrying on or conducting of the business of a wholesale dealer in oleomargarine, in such manner as to become a criminal offense punishable under Sec. 18 of the act; particularly when the same act,

in Sec. 5, requires a manufacturer of the article to keep such books and render such returns as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may, by regulation, require, and does not impose, in that section or elsewhere in the act, the duty of keeping such books and rendering such returns upon a wholesale dealer in the article.

"It is necessary that a sufficient statutory authority should exist for declaring any act or omission a criminal offense; and we do not think that the statutory authority in the present case is sufficient. If Congress intended to make it an offense for wholesale dealers in oleomargarine to omit to keep books and render returns as required by the regulations to be made by the Commissioner of Internal Revenue, it would have done so distinctly, in connection with an enactment such as that above recited, made in Sec. 41 of the act of October 1, 1890.

"Regulations prescribed by the President and by the heads of departments, under authority granted by Congress, may be regulations prescribed by law, so as lawfully to support acts done under them and in accordance with them, and may thus have, in a proper sense, the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offense in a citizen, where a statute does not distinctly make the neglect in question a criminal offense."

United States v. *Williamson*, 207 U. S. 425 (1908) (458 et seq.) was the next criminal case to pass on the question here involved. *The prosecution attempted to cure the defect pointed out by this Court in the Eaton case by reading the regulations in connection with the conspiracy statute, as in the case at bar.* The defendant was indicted for a conspiracy to suborn perjury by conspiring to procure an applicant after he had made his preliminary sworn statement concerning the bona fides of his application of the absence of any contract or agreement in respect to the title as required under the Timber and

Stone Act of June 3, 1878, 20 Stat. 89, to additionally swear falsely to such facts on final proof, which additional swearing to such facts on final proof was required by a regulation of the Land Commissioner. This Court, speaking through Mr. Justice White, held on the authority of *Myers* v. *Croft*, 13 Wall. 291, and *Adams* v. *Church*, 193 U. S. 510, that the regulation in question was invalid and hence a violation of it or a conspiracy to violate it was not a crime, even when the regulations are read in connection with Section 37 C. C. The regulation in question was intended to prevent the applicant's making a contract to convey after patent issued, his right and interest in Government lands between the time of the preliminary application and the time of the final vesting of title in the applicant. The Court said, at pages 461-462:

> "It remains only to consider whether it was within the power of the Commissioner of the General Land Office to enact rules and regulations by which an entryman would be compelled to do that at the final hearing which the act of Congress must be considered as having expressly excluded in order thereby to deprive the entryman of a right which the act by necessary implication conferred upon him. To state the question is to answer it. As observed in *Adams* v. *Church*, supra, at p. 517: 'To sustain the contention * * * would be to incorporate * * * a prohibition against the alienation of an interest in the lands, not found in the statute or required by the policy of the law upon the subject.' True it is that in the concluding portion of Sec. 3 of the Timber and Stone Act it is provided that 'effect shall be given to the foregoing provisions of this act by regulations to be prescribed by the Commissioner of the General Land Office.' But this power must in the nature of things be construed as authorizing the Commissioner of the General Land Office to adopt rules and regulations for the enforcement of the statute, and cannot be held to have authorized him, by such an exercise of power, to virtually adopt rules and regulations destructive of rights which Congress had conferred."

The *Eaton* case and the *Williamson* case are direct authorities for the contention of the defendants in support of the demurrer, that since the Act, September 24, 1917, Chapter 56, Section 6, does not in express terms forbid the acts which the defendants are alleged to have conspired to commit, and since this enabling act does not declare the violation of any regulations made pursuant to its authority to be an offense against the United States, or affix a penalty therefor, the regulations in question are invalid; at all events, a violation of, or a conspiracy to violate these regulations is not a crime.

That this contention is the proper one is more clearly seen from a consideration of the three more recent cases of *U. S.* v. *Grimaud*, 220 U. S. 506 (1911); *U. S.* v. *Smull*, 236 U. S. 405 (1915); *U. S.* v. *Morehead*, 243 U. S. 607 (1917); (cited in brief on behalf of U. S., p. 21).

The first of these, the *Grimaud* case, held that where a statute in express terms makes the violation of regulations made by an executive office an offense against the United States and provides a penalty therefor, such violation is made a crime by Congress and not by the executive officer. In other words, this Court expressly limited the doctrine contended for by the government to a case in which Congress had specifically declared in the enabling act that a violation of the executive regulations promulgated pursuant to its authority, would be a crime. *United States* v. *Smull*, 236 U. S. 405 (1915) follows the *Grimaud* case on the principle that false swearing was made a crime, not by the departmental regulations, but by Congress; the statute, not the department, declaring it to be a criminal offense and affixing a penalty. *United States* v. *Morehead*, 243 U. S. 607 (1917) also follows the rule laid down in the *Grimaud* case and for the same reason.

This Court distinguished the *Grimaud* case from the case of *U. S.* v. *Eaton*, 144 U. S., supra, on that ground, namely, that while the act in the latter case authorized the commission to make rules for carrying the statute into effect, it did not declare their violation to be a crime, or impose a penalty for failing to observe them. At page 519, commenting on the *Eaton* case, the Court said:

> "The defendants rely on *United States* v. *Eaton*, 144 U. S. 677, *where the act authorized the Commissioner to make rules for carrying the statute into effect, but imposed no penalty for failing to observe his regulations.* Another section (5) required that the dealer should keep books showing certain facts, and providing that he should conduct his business under such surveillance of officers as the Commissioner might by regulation require. Another section declared that if any dealer should knowingly omit to do any of the things 'required by law' he should pay a penalty of a thousand dollars. Eaton failed to keep the books required by the regulations. But there was no charge that he omitted 'anything required by law,' unless it could be held that the books called for by the regulations were 'required by law.' The Court construed the act as a whole and proceeded on the theory that *while a violation of the regulations might have been punished as an offense if Congress had so enacted, it had, in fact, made no such provision so far as concerned the particular charge then under consideration. Congress required the dealer to keep books rendering return of materials and products, but imposed no penalty for failing so to do.* The Commissioner went much further and required the dealer to keep books showing oleomargarine received, from whom received and to whom the same was sold. *It was sought to punish the defendant for failing to keep the books required by the regulations. Manifestly this was putting the regulations above the statute. The court showed that when Congress enacted that a certain sort of book should be kept, the Commissioner could not go further and require additional books;*

> *or, if he did make such regulation, there was no provision in the statute by which a failure to comply therewith could be punished.* It said that, 'if Congress intended to make it an offense for wholesale dealers to omit to keep books and render returns required by regulations of the Commissioner, it would have done so distinctly'—*implying that if it had done so distinctly the violation of the regulations would have been an offense.*
>
> "But the very thing which was omitted in the Oleomargarine Act has been distinctly done in the Forest Reserve Act, which, in terms, provides that *'any violation of the provisions of this act or such rules and regulations of the Secretary shall be punished as prescribed in Section 5388 of the Revised Statutes as amended.*"

After some observation on the difficulty in drawing the line between Legislative and Administrative functions, and with evident reluctance to further extend the rule that power to make rules the violation of which shall be a criminal offense may be delegated, this Court decided in favor of the validity of the act in question *but strictly limited its application to a case where Congress expressly makes a violation of the regulations a crime and affixes a penalty.* The generality of this rule must be further limited in application to its own particular facts, on the rule laid down by Mr. Justice Marshall in *Cohen* v. *Virginia*, 6 Wheat 264, 398, "that general expressions on any point are to be taken in connection with the case in which such expressions are used. If they go beyond a particular case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision," that is to say, this rule applies only to a case where such delegation of authority within the mode prescribed by the *Grimaud* case, is for the protection of Government property or for the proper administration and execution of Governmental power (*Boske* v. *Comingore*, 177 U. S. 459 (1900); *U. S.* v. *Grimaud*, 220 U. S. 506, supra), and not destructive of property rights

or liberties of the citizen (*U. S.* v. *Williamson*, 207 U. S. 425, supra; *U. S.* v. *Eaton*, 144 U. S. 677, supra). The Court, in the *Grimaud* case properly recognized this limitation on the rule therein laid down, when it said at pages 522-523:

> "*The Secretary of Agriculture could not make rules and regulations for any and every purpose. Williamson* v. *United States*, 207 U. S. 462. As to those here involved, they all relate to matters clearly indicated and authorized by Congress. *The subjects as to which the Secretary can regulate are defined.* The lands are set apart as a forest reserve. *He is required to make a provision to protect them from depredations and from harmful uses. He is authorized to 'regulate the occupancy and use and to preserve the forests from destruction.' A violation of reasonable rules regulating the use and occupancy of the property is made a crime, not by the Secretary, but by Congress. The statute, not the Secretary, fixes the penalty.* * * * The Secretary did not exercise the legislative power of declaring the penalty or fixing the punishment for grazing sheep without a permit, but the punishment is imposed by the act itself. The offense is not against the Secretary, but, as the indictment properly concludes, 'contrary to the laws of the United States and the peace and dignity thereof.'"

C.

It would appear, therefore, that the *Grimaud* case is not an authority for the proposition contended for by the Government and the instant case is not within the rule there laid down. The rule laid down in *United States* v. *Eaton*, 144 U. S. 677, 688, is the one directly in point:

> "It would be a very dangerous principle to hold that a thing prescribed by the Commissioner of Internal Revenue, as a needful regulation under the Oleomargarine Act, for carrying it into effect, could be considered as a thing 'required by law' in

> the carrying on or conducting of the business of a wholesale dealer in oleomargarine, in such manner as to become a criminal offense punishable under Sec. 18 of the act; * * *
>
> "Regulations prescribed by the President and by the heads of departments, under authority granted by Congress, may be regulations prescribed by law, so as lawfully to support acts done under them and in accordance with them, and may thus have, in a proper sense, the force of law, and it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offense in a citizen, where a statute does not distinctly make the neglect in question a criminal offense."

U. S. v. *Williamson*, 207 U. S. 425, 458, et seq., adds the further limitation that *such deficiency in the enabling statute may not be supplied by reading the regulations in connection with Sec. 37 C. C. covering conspiracy.*

U. S. v. *Grimaud* did not change the rule laid down in the *Eaton* case, nor did it alter the rule of the *Williamson* case. The Treasury Department, however, would change this rule and would extend the doctrine of the *Grimaud* case to those cases, such as the one at bar in which the enabling act did not declare a violation of the regulations to be a criminal offense or affix a penalty therefor. In other words, while under the rule of the *Grimaud* case, and cases following it, it would seem that the doctrine that "the power to make rules the violation of which would be a criminal offense is a legislative function and as such may not be delegated" (*U. S.* v. *Eaton*, 144 U. S. 677, supra; *U. S.* v. *Williamson*, 207 U. S., supra; *U. S.* v. *Blasingame*, 166 Fed. 654) is almost moribound, the Treasury Department asks this Court in the instant case to ease its dying agony and declare it non-existent. It is submitted that the doctrine is not wholly dead, nor has its right to live been wholly abrogated even under the doctrine which found authoritative expression in the *Grimaud* case and the cases following it. This doctrine,

briefly stated, is that there may be such delegation of authority to make rules the violation of which will be a criminal offense, *but only where the enabling act expressly makes it a criminal offense to violate regulations made under such enabling act and fixes the penalty*, and may properly be said to date back to *United States* v. *Hudson*, 7 Cranch 31, 34, decided in 1812, on the question whether Courts of the United States have jurisdiction of common law offenses, where this Court said: "*The legislative authority must first make an act a crime, affix a punishment to it*, and declare the court that shall have jurisdiction of the offense." Beyond this it is submitted this Court may not and should not extend the rule.

The defendants have no quarrel with the rule of the *Grimaud* case and of those cases which follow it, to the effect that where the statute in express terms declares that a violation of regulations made by an executive officer pursuant to the authority conferred on him by such statute is a criminal offense and affixes the penalty, it is not such a delegation of legislative function as to be void. But is it submitted that in the case at bar *this rule is inapplicable inasmuch as Congress omitted to declare that a violation of the terms and conditions which it authorized the Secretary to make to be a crime or to indicate a penalty therefor.* This omission conclusively negatives the existence of a Congressional intent to make the violation a crime (*Myers* v. *Croft*, 13 Wall. 297; *Adams* v. *Church*, 193 U. S. p. 517).

To sustain the theory of the indictment would be to hold that the Secretary of the Treasury could by his regulations alone impose some sort of anomalous servitude upon the purchased War Savings Stamps and Certificates in the hands of the original purchasers, the lawful owners, so that any dealings with them thereafter by such original purchaser or other citizens (except for the original purchaser to hold and redeem them) would be a criminal offense against the United States. To state such a proposition is to show its absurdity, as the Secretary of

the Treasury may not alter or amend the act (*Morrill* v. *Jones*, 106 U. S. 466, supra; *U. S.* v. *Eaton*, 144 U. S. 677, supra; *U. S.* v. *Williamson*, 207 U. S. 425, supra).

It is not disputed that Congress has the power to so limit the property rights and liberties of citizens but it has not done so expressly in the enabling act nor has it done that which was held to be sufficient to effect this result in *U. S.* v. *Grimaud*, 220 U. S. 506, supra. It is submitted that the right to acquire property is inherent in the citizen (*Morrill* v. *Jones*, 106 U. S., supra; *U. S.* v. *Williamson*, 207 U. S. 425, supra), and the right to alienate property lawfully acquired from the Government and owned, is inherent in the ownership of property (*Thredgill* v. *Pintard*, 12 How. 24, supra; *Myers* v. *Croft*, 13 Wall. 291, supra; *Adams* v. *Church*, 193 U. S. 511, supra).

These rights may not be taken away by mere executive fiat (*Adams* v. *Church*, 193 U. S. 511; *Myers* v. *Croft*, 13 Wall. 291, supra; *U. S.* v. *Williamson*, 207 U. S. 425, supra). Nor may their exercise in violation of executive regulations be made a crime except by express statutory enactment (*U. S.* v. *Eaton*, 144 U. S. 677; *U. S.* v. *Williamson*, 207 U. S. 425). Unless the enabling act declares the violation of regulations made pursuant to powers thereby conferred to be unlawful and prescribes a penalty therefor, there is no criminal offense committed in violating or conspiring to violate such regulations (*U. S.* v. *Grimaud*, 220 U. S. 506; *U. S.* v. *Smull*, 236 U. S. 406, supra; *U. S.* v. *Morehead*, 243 U. S. 607, supra). And such statutory deficiency is not supplied even when such executive regulations are read in connection with Section 37 C. C. covering conspiracy (*United States* v. *Williamson*, 207 U. S. 425, supra).

On no rule of established law, therefore, can the acts alleged to have been done by defendants constitute a criminal offense against the United States.

Points and Authorities of Plaintiff-in-Error.

POINT I.

Under this point two propositions are advanced: (1) The act made the certificates the obligation of the United States and the stamp merely a method of fixing the amount for said obligation (Brief of plaintiff-in-error, p. 9). (2) The regulations provided that the stamps and certificates were non-transferable and payable only to the owners named on the certificates.

(1) That the first proposition is based on erroneous construction of the statute and of the acts of the Secretary of the Treasury in issuing these securities has been shown in detail in subdivision E, Point I, of defendants' main argument.

(2) As to the invalidity of the regulations to effect the result contended for by the prosecution, the whole of defendants' brief is designed to show.

POINT II.

The doctrine that a conspiracy to violate, in the manner alleged in the two counts of the indictment, the regulations or conditions prescribed by the Secretary of the Treasury, constituted (a) a conspiracy to defraud the United States within the meaning of Section 37, Criminal Code, and (b) a conspiracy to alter an obligation of the United States, with intent to defraud, within the meaning of Section 148, Criminal Code, is not sustained by the authorities cited.

(a) The proposition here contended for rests upon the dictum of this Court in *Haas* v. *Henkel,* 216 U. S. 462, 480, to the effect that:

> "The statute is broad enough in its terms to include any conspiracy for the purpose of impairing,

> obstructing or defeating the lawful functions of any department of the Government."

It is a cardinal rule of interpretation of judicial opinion laid down by this Court in *Cohen* v. *Virginia*, 6 Wheat. 264, 398 (1821), when speaking through Chief Justice Marshall, it said:

> "It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

A consideration of the facts of *Haas* v. *Henkel*, 216 U. S., supra, and the other cases relied on by the Government in the light of this rule, is pertinent.

The defendant Haas was indicted with others in the District of Columbia for an alleged conspiracy to defraud the Government by obtaining information as to the Government crop report on cotton, prior to its official publication, in violation of a regulation of the Department of Agriculture, prohibiting the giving of such information in advance of official publication. A bench warrant was issued and returned "not found." The defendant Haas was indicted for the same offense in the Southern District of New York, subsequently, and pleaded "not guilty." Thereupon the United States Attorney General moved to change the place of trial from New York to the District of Columbia for the convenience of Government officials and witnesses. The Commissioner, after a hearing, granted an order of removal over

the defendant's objection. Thereupon a petition for a writ of habeas corpus and certiorari was filed in the Circuit Court, averring an illegal arrest and detention in violation of the constitution of the United States. The Circuit Court, upon a hearing in which both indictments were put in evidence, denied the writs and remanded the petitioner. Appeal was then taken to the Supreme Court of the United States, which granted a final order denying the writ.

The defendant petitioner urged the New York indictment, to which he had pleaded not guilty, as valid to resist a change of venue to the District of Columbia, and then attempted, at the same time, to attack the legal force and effect of the sub-structure of both indictments, i. e., the executive regulations.

Although the Court, in the opinion, discussed the force and effect of these regulations, whatever was said was merely dicta, as the only issue decided was the writ of removal. The holding of the case is that *where two indictments are brought against a defendant, alleging the same offense, but each indictment making the locus of the crime in a different district, the Government may determine at its option in which of the Districts it desires to have the trial, over the objections of the defendant if it is shown that witnesses for the Government will be convenienced by having the trial in the district designated by the Government.* The effect of the holding in so far as the sufficiency and ultimate validity of the executive regulations in question to sustain the indictments was involved was that the legal force and effect of such regulations upon which the indictment was based *could not be attacked collaterally.*

At page 481 of the opinion, the Court said:

> "It is enough to hold, *as we do,* that the indictments sufficiently charge an offense committed within the District of Columbia to require that the appellant shall be removed to that District for trial. *Benson* v. *Henkel,* 198 U. S. 1.

> "The introduction of certified copies of the District of Columbia indictments made a *prima facie* case for removal. That case was not overcome by the copies of the New York indictments."

And speaking further, at page 482, the Court said:

> "But if the fact be that the offense charged in both sets of indictments is identical and that the *locus* of the conspiracy is alleged in one set as in one District, and in the other as of a different District, it is still for the Government to determine in which of the two Districts it will bring the accused to trial."

The Court did not attempt in this decision to lay down a rule as to the sufficiency and ultimate validity of mere executive regulations to sustain an indictment. It is submitted that the validity of the regulations in question could not be decided by such collateral method of attack. This was hinted at in the majority opinion. Mr. Justice Brewer, at page 482, expressly recognized it when he said:

> "I concur in affirming the order of removal in these cases but my concurrence must not be taken as holding that the indictments will stand, the final test of validity or sufficiency. Assuming that there is a doubt in respect to these matters, as I think there is, *and as seems to be suggested by the opinion in 367* (the major opinion), I am of the opinion that such doubt should be settled by direct action in the court in which the indictments were returned and not in removal proceedings" (parenthesis ours.)

At page 483, the opinion of Mr. Justice McKenna is thus stated:

> "Mr. Justice McKenna concurs in the result, but reserves opinion whether the facts alleged in the indictment constitute a conspiracy to defraud the United States."

This case, therefore, cannot be cited for the proposition that "the statute is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing or defeating the lawful intention of any department of government." This statement as is shown above, is mere *dicta* and not necessary for the decision given in this case.

However, if the facts in the *Henkel* case were considered on their merits, it is an arguable proposition that it could be brought within the conspiracy statute independently of any such executive regulations by reason of the following facts. The Government collected this information upon which it based its official crop report at great expense and labor. This information had both a governmental value and a commercial value to private citizens. It was in the nature of property. The Government had, therefore, in such information thus collected by it, an interest in the nature of property or a proprietary right which it might be considered unlawful for any one to violate or destroy by giving out this information in advance. The Federal Courts have held that news gathered by the Associated Press and other news agencies, is property (*International News Service* v. *Associated Press*, 248 U. S. 215), and all Courts have held that trade secrets are property. By analogy, therefore, it would seem that this specialized information, collected by the Government, was property, or at least was something in which the Government had a proprietary interest in the nature of property, which it might be a criminal offense to appropriate to private use.

Aside from this, the information was part of the official Government records used by the Government in its governmental functioning, i. e., in the execution of governmental powers conferred on it by the Constitution and, therefore, regardless of whether there was a property loss or not, the Government could prevent their appropriation or use in other than the mode prescribed by law (*Boske* v. *Comingore*, 177 U. S. 459). Clearly, this

is the import of the dictum in *Haas* v. *Henkel*, considered in its relation to its own particular facts.

However this may be, even such reasoning would not make the *Henkel* case applicable to the case at bar. In the case at bar, the Government has no such property right or proprietary interest in the War Savings Certificates and Stamps. After they have been sold to lawful purchasers for value, they become the sole property of such purchasers. The Government's right in such certificates, its property or its proprietary interest therein is relinquished for value, and the right of lawful owners is thereafter absolute, *in the absence of statutory restrictions.*

In *United States* v. *Plyler*, 222 U. S. 15, the defendant was indicted for forging vouchers required upon examination by the Civil Service Commission of the United States certifying to the character, etc., of the applicant, the defendant, and for presenting the same to the commission in violation of Revised Statutes, Section 5418. Held, the case was within the statute, on the ground that there was a violation of the statute and the statute was for the furtherance and protection of governmental functions.

United States v. *Barnow*, 239 U. S. 74, involved the violation of Section 32 C. C., forbidding the impersonation of an officer or employee acting under authority of the United States.

These two latter cases involved the violation of express terms of Congressional statutes and are therefore not in point. They are cited apparently for the language used which is that of the quotation from *Haas* v. *Henkel*, 216 U. S. 480, supra.

The case of *United States* v. *Keitel*, 211 U. S. 370, bears closer scrutiny. The defendants in that case were

indicted for a conspiracy to violate Sections 2347-2350 Revised Statutes, which statutes allowed any individual or association to obtain a certain allotment of Government coal lands upon compliance with the terms therein stated, and further limited such individual, association or a member of an association, from making more than one such entry. The defendants were charged with a conspiracy to obtain more allotments than allowed by the statute by procuring various persons as agents, to enter coal lands, in their own names, ostensibly for their own benefit, but in reality for the use and benefit of the accused and a named organization; the purchases being made by the agents as above stated, not with their own money, but with money of the defendants, and under agreements to convey the title when acquired, to the defendants, thus enabling the defendants to obtain coal lands belonging to the United States in excess of the quantity which the defendants were allowed by the statute to enter. On this state of facts the indictment was held good, and an order quashing the count as contained these allegations, reversed.

The distinction between the *Keitel* case, and the case at bar, is obvious and may be briefly summarized:

1. The conspiracy charged was to violate the express provisions of a Congressional statute, and not a mere executive regulation.

2. The conspiracy charged was to thus unlawfully acquire property owned by the Government.

3. No question of a restraint on alienation after lawful acquisition from the United States was involved.

As to objections 1 and 2 set forth above, the facts shew the validity of the distinction herein made as do the remarks of the Court at page 388:

> "The express command that the preceding section shall be held to authorize only one entry by

> the same person or association of persons causes the grant to purchase not to embrace more than one entry by the same person, and as the right to purchase the coal lands did not exist except by the authority conferred by the statute, it follows that the express provision excluding the right to do a particular act is both, in form and substance, a prohibition against the doing of such act. To hold that this prohibition does not exclude the existence in a disqualified person of a power to employ an agent to make a second entry, to furnish him with the money to pay for the land, under an obligation when he has bought from the United States to transfer the land to the disqualified person, *would require us to say that the power was given to do that which the statute, in express terms, declares shall not be done.* In other words, it would compel us to decide that an act done for a disqualified person by an agent acting for him and for his exclusive benefit was not the act of the disqualified principal."

The third objection is amply set forth in the opinion where the Court defines the proper basis for sustaining the indictment in that case, at page 399:

> "And the public policy lying at the foundation of the prohibition against an entry of land for the conceded benefit of another, *whilst leaving full power of disposition in one who acquired the land in compliance with the statute*, was pointed out in *United States* v. *Budd*, 144 U. S. 154, where, in considering the Timber and Stone Act of June 3, 1877, C. 151, 20 Stat. 89, it was said (p. 163): '*The Act does not in any respect limit the dominion which the purchaser has over the land after it is purchased from the Government, or restrict in the slightest his power of alienation.* All that it denounces is a prior agreement, the acting for another in the purchase. *If when the title passes from the Government, no one save the purchaser has any claim upon it or any contract or agreement for it, the act is satisfied.*'"

The cases cited, and particularly the *Keitel* case, are therefore not applicable to the facts of the case at bar.

(b) The proposition here contended for has been adequately refuted in defendants'-in-error main argument, Point I, subdivision E (p. 24) supra.

POINT III.

The doctrine that the Secretary of the Treasury had power to make and promulgate the regulations or conditions contained in the circular of November 15, 1917 (No. 94), is also not sound or sustained by the authorities cited:

(a) The argument in support of the reasoning of the Court as outlined under this subdivision of the Government's brief has been elaborated in detail in the main part of this brief on behalf of defendants-in-error and more particularly under Point I thereof.

(b) The Government here urges the statement of the Court in *Boske* v. *Comingore*, 177 U. S. 459, 470, as negativing the validity of the lower Court's reasoning and *ipso facto* of defendants' argument in support thereof. Again, the prosecution's choice of an authority is unhappy, inasmuch as the doctrine of that case is inapplicable to the facts of the case at bar.

Under the authorization of Section 161, Revised Statutes, the Secretary of the Treasury issued regulations forbidding revenue officers to give out special records of the Treasury or copies thereof to private persons, or to local officers, or to produce such records in a State court, and prescribing the mode in which such records or copies thereof could be made available to such individuals or Courts. Section 3167, Revised Statutes, further pro-

vided that it should be a penal offense for any revenue officer to make known in any manner other than might be provided by law, the operations, etc., of any manufacturer or producer visited by him in the discharge of his duty. The defendant was adjudged in contempt of a State court for failure to file reports, on stocks of liquors made to his office by a defendant in proceedings in a State court, and was taken in custody. On a writ of habeas corpus, this Court ordered the discharge of the defendant, holding that the regulations of the Secretary of the Treasury were valid as within the statutory powers conferred for the protection of Government records and that the enabling act was valid under the Constitution, Article 1, Section 8.

The distinction between that case and the case at bar, is obvious:

1. The regulations were for the protection of governmental property, or official records, used in the furtherance and execution of governmental powers constitutionally conferred.

2. To have held the rules invalid would have made the State court superior to the Federal Government in a sphere of exclusive Federal jurisdiction.

3. Such invalidation of the rules would have involved the nullification of a Federal criminal statute forbidding the defendant to do the thing prohibited by the regulations.

4. There was no limitation on any property right or liberty of a citizen by such regulations.

Not only were governmental interests of the United States sought to be safeguarded as above stated, but the remarks of this Court, speaking through Mr. Justice Har-

lan, at page 469, also shows the protection of property rights and other interests of private citizens as a reason for the decision:

> "There is certainly no statute which expressly or by necessary implication forbade the adoption of such a regulation. This being the case, we do not perceive upon what ground the regulation in question can be regarded as inconsistent with law, unless it be that the records and papers in the office of a collector of internal revenue are at all times open of right to inspection and examination by the public, despite the wishes of a department. That cannot be admitted. *The papers in question, copies of which were sought from the appellee, were the property of the United States, and were in his official custody under a regulation forbidding him to permit their use except for purposes relating to the collection of the revenues of the United States.* Reasons of public policy may well have suggested the necessity, in the interest of the Government, of not allowing access to the records in the offices of collectors of internal revenue, except as might be directed by the Secretary of the Treasury. *The interests of persons compelled, under the revenue laws, to furnish information as to their private business affairs would often be seriously affected if the disclosures so made were not properly guarded.*"

(c) This part of the Government's argument is merely a re-statement of the theory of the prosecution, and is sufficiently answered in the main argument of this brief.

(d) The argument here advanced is itself based on a *petitio principii*. By assuming that the stamps and certificates, in the light of the Treasury regulations in question, constituted a special and limited contract without the right of transfer, i. e., was unassignable, the prosecution is also assuming that the regulations imposing such limitations on these securities have the force and effect

of law; that such regulations by virtue of the enabling act, were the equivalent of a Congressional enactment. The conclusion is then made from such assumptions that Congress did authorize such limitations on these securities, and that the regulations in question are therefore valid. In the language of the Court below, "This is an ingenious, but fallacious arrangement of words" (R. 28).

(e) Counsel for the Government need not surmise as to the idea "at the bottom of the District Judge's reasoning," as the Court below explicitly stated that "a stamp is a thing of value, bought and paid for, and to deprive it of the quality of assignability is a diminution of lawful existing property rights for which, in my judgment, Congressional action alone will suffice" (R. 29). This statement of the law goes back to *Thredgill* v. *Pintard*, 12 How. 24, supra, which rule was authoritatively re-enunciated in *Myers* v. *Croft*, 13 Wall. 291, 296, supra; *Adams* v. *Church*, 193 U. S. 511, 516-517, supra; and *United States* v. *Williamson*, 207 U. S. 425, 458, et seq. The argument of the prosecution really states the same thing, as the cases cited by it are all cases, decided on statutes which destroy the right of assignability, and in which the Congressional acts themselves are cited. This part of the argument is obviously based on the unexpressed assumption that the regulations in question are equivalent to a Congressional statute, which latter is the proposition to be proved. The prosecution thus unconsciously argues for the defendants.

(f) The cases here cited have been considered and the argument here advanced answered under Point II supra, of the main argument for the defendants.

(g) Counsel for the prosecution are in error when they state that Judge Hand "decided directly to the contrary on demurrer to the indictments in the case at bar."

Judge Hand's decision was on demurrer to a prior indictment. The decision of Judge Hough on which this writ of error was brought, was as to an indictment which superseded that which Judge Hand sustained.

Moreover, in attempting to urge Judge Hand's opinion, even assuming that it was on demurrer to the present indictment, the prosecution is arguing both ways at once. Judge Hand said "it is contended by the demurrants that disobedience to the regulations of the Secretary of the Treasury does not constitute a crime against the United States. This is in a literal sense true. The indictment is, however, based upon no such theory." On the other hand, the prosecution has argued all through its brief on the theory that the violation of the regulations of the Secretary of the Treasury does constitute a crime against the United States and that the indictment is based on such theory.

The decision of Judge Hand, with respectful submission, is not only erroneous, but not of weight in the determination of the instant case.

CONCLUSION.

The Act, September 24, 1917, Section 6, and as amended, does not prohibit or declare to be unlawful the acts of the defendants complained of in the indictment, and on the authorities hereinbefore discussed and for the reasons hereinbefore advanced. There was no express delegation of authority in said statute to the Secretary of the Treasury to prohibit such acts or to make them unlawful. It has been uniformly held that "language" and "the intent to make" must be identical to make an act constitute a penal offense. The principle that the legislative intent is to be found, if possible, in the enactment itself, and that statutes are not to be extended by

construction to cases not fairly and clearly in their terms, is one of great importance to the citizen. The Courts have no power to create offenses, but, if by a latidudinarian construction, they construe cases not provided for to be within legislative enactments, it is manifest that the safety and liberty of the citizen are put in peril, and that the legislative domain has been invaded. The doctrine is fundamental in English and American law that there can be no constructive offenses, that before a man can be punished his case must be plainly within the statute. And if there be any fair doubt whether the statute embraces it, that doubt is to be resolved in favor of the accused. These principles of law admit of no dispute, and have been declared by the highest courts, and by no tribunal more clearly than the Supreme Court of the United States.

> *United States* v. *Morris*, 14 Pet. 464 (1840);
> *United States* v. *Wiltberger*, 5 Wheat. 76, supra;
> *United States* v. *Sheldon*, 2 Wheat, 119 (1817).

As was said in *United States* v. *Wiltberger*, 5 Wheat supra, at pages 95-96, by Chief Justice Marshall, "the rule that penal laws are to be construed strictly is perhaps not much less old than construction itself."

Accordingly, in conclusion, the defendants plead the rule laid down by this Court in *France* v. *United States*, 164 U. S. 676 (1897), at page 682, when it said:

> "*The statute does not cover the transaction, and however reprehensible the acts of the plaintiffs-in-error may be thought to be, we cannot sustain a conviction on that ground.* Although the objection is a narrow one, yet the statute being highly penal, rendering its violator liable to fine and imprisonment, we are compelled to construe it strictly

** * * If it be urged that the act of these plaintiffs-in-error is within the reason of the statute, the answer must be that it is so far outside of its language that to include it within the statute would be to legislate and not to construe legislation."*

It is respectfully submitted that the judgment of the District Court should be sustained and the indictment dismissed.

Respectfully submitted,

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